FILED
JUL 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30303

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Introduction	3
Facts	4
Reasons for Granting the Writ	9
Conclusion	19
Appendix A, Opinion of Court of Appeals	A-1
Appendix B, Opinion of District Court Granting Motion for Partial Summary Judgment	A-23
Appendix C, Order of District Court Granting Summary Judgment and Dismissing Complaint	A-33
Appendix D, Judgment of Court of Appeals	A-37
Appendix E, "Integrated Cattle Marketing—A Better Way," by Clement E. Ward	A-38

Citations

Cases

Bayside Enterprise, Inc. v. National Labor Relations Board, — U.S. —, 97 S.Ct. 576 (1977) 10, 17, 18

Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 384 (1967) 14, 18

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962) 5, 18

Garth, 56 T.C. 610 (1971) 12

Maple Leaf Farms, Inc., 64 T.C. 438 (1975) 12

Tigner v. Texas, 310 U.S. 141, 145-147 (1940) 9

United States v. Chemell, 243 F.2d 944 (5th Cir. 1957) .. 11

United States v. Whitridge, 197 U.S. 135, 143 (1905) ... 15

Statutes

7 U.S.C. § 291-292 ..... 3, 5, 9

12 U.S.C. § 2129 18

15 U.S.C. § 1 2

28 U.S.C. § 1254(1) 2

Legislative Materials

H.R. Rep. No. 24 67 Cong. 1st Sess. 1 (1921) 14

62 Cong. Rec. 2052 (1922) 14

62 Cong. Rec. 2173 (1922) 14

62 Cong. Rec. 2052, 2172 (1922) 14

62 Cong. Rec. 2217 (1922) 16

62 Cong. Rec. 2218 (1922) 16

62 Cong. Rec. 2263 (1922) 16

62 Cong. Rec. 2227, 2273 (1962) 16

Miscellaneous

Casper & Posner, The Workload of the Supreme Court (1976) 13

Knapp, The Rise of American Cooperative Enterprise 1620-1920 (1969) 6

Roy, Contract Farming and Economic Integration (2d ed. 1972) 12

Tobin & Arthur, Dynamics of Adjustment in the Broiler Industry (1964) 7

U.S. Dep't of Agriculture, Agricultural Statistics, 1941 .. 6

Ward, Integrated Cattle Marketing—A Better Way, U.S. Dep't of Agr., Farmer Cooperative Serv., FCS Info. 107, May 1977 ..... 12, 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

OPINIONS BELOW

The opinion of the court of appeals (App. A., *infra* at A-1) is reported at 550 F.2d 1380. The opinion of the district court granting petitioner's motion for partial summary judgment (App. B., *infra* at A-23) is not officially reported, but appears at 1975-2 CCH Trade Cas. ¶60,509. The order of the district court granting summary judgment and dismissing the complaint (App. C., *infra* at A-33) is not reported.

JURISDICTION

The judgment of the court of appeals (App. D., *infra* at A-37) was entered on April 22, 1977. The jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

QUESTION PRESENTED

The Capper-Volstead Act provides that "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" may form cooperative associations which are exempt from Section 1 of the Sherman Act. Petitioner is a cooperative association whose members include integrated producers of broiler chickens, concededly an "agricultural product" within the meaning of the Capper-Volstead Act.

The question presented is whether integrated producers of broiler chickens are not "farmers" within the meaning of the Capper-Volstead Act because, although they own the flocks, make all production and marketing decisions, incur more than 90 percent of the cost of producing the broiler chicken, and assume the primary risk of market price fluctuations, they employ independent contractors ("growers") to tend the chicken during its "grow-out" phase from chick to mature chicken.

STATUTES INVOLVED

Section 1 of the Sherman Act, as amended, 15 U.S.C. §1, provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

The Capper-Volstead Act, 7 U.S.C. §§ 291-292, is set forth in full in the court of appeals' opinion in this case, App. A, *infra*, at A-5, n. 5. Section 291 provides in part:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such association may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . ."

STATEMENT

Introduction

The Department of Justice filed this civil antitrust suit against petitioner, the only national cooperative agricultural marketing association of producers of broiler chickens, charging the association and its members with price fixing in violation of Section 1 of the Sherman Act. Petitioner moved for summary judgment on the ground that the Capper-Volstead Act exempts the challenged activities from Section 1 of the Sherman Act. The district court granted the motion and ordered the complaint dismissed. The Court of Appeals for the Fifth Circuit reversed, holding that petitioner was excluded from the protection of the Capper-Volstead Act because the integrated producers who comprise it are not "farmers" within the meaning of the Act. The sole issue in this case is whether the court of appeals was correct in construing the Capper-Volstead Act to exclude integrated broiler producers.

Facts

The facts are stipulated (R. 574).[1] Broilers—conceded to be an "agricultural product" within the meaning of the Capper-Volstead Act (R. 526)—are young chickens, slaughtered at seven to nine weeks of age, processed, and offered for sale ready to cook. Their production involves the following steps: (1) raising, breeding, and placing breeder flocks for the production of eggs to be hatched as broiler chicks, (2) hatching the broiler eggs and placing the broiler chicks, (3) raising the chicks for a period of seven to nine weeks, (4) catching and cooping the grown-out chickens and hauling them to processing facilities, (5) preparing the broilers for market (R. 526-527). Originally each step was in the hands of a different entity but gradually the growers, hatcherymen, feed dealers, etc. integrated into most or all phases of broiler production (R. 533). Today more than 95 percent of the broilers marketed in the U.S. are marketed by integrated broiler producers (R. 526).

The typical "integrator", as the integrated broiler producer is known, performs each of the five steps in broiler production listed above internally with the partial exception of step 3, the so-called "grow-out stage. In this stage the integrators hire "growers", as they are called, to provide certain services in raising the integrator's chicks to maturity (when the integrator resumes custody of his chickens). Even during the grow-out stage, when the grower has physical custody of the chicken, the integrator, not the grower, makes all decisions regarding the diet and type of feed of the growing chickens and supplies all of the feed consumed by the chickens. The integrator, not the grower, supplies the medicines, vaccines, and other health supplies for the growing chickens, plus any veterinary services that may be necessary. The integrator, not the grower, transports the chicks

[1] "R." references are to the joint appendix of the parties in the court of appeals, which has been lodged with this court together with the entire record in the court of appeals.

and feed to the growers and the grown-out chickens from the grower to the processing plant. The integrator, not the grower, provides all the equipment and some or all of the labor for catching, cooping, and loading the live birds. The integrator makes all decisions with regard to the age and size at which the birds shall be marketed, and even furnishes fieldmen or supervisors who visit the grower frequently (usually every week) to monitor the grower's performance. (R. 529).

More than 90 percent of the total cost of producing a broiler is incurred by the integrator and less than 10 percent by the grower (R. 474, 531, 533). The grower's investment is limited mainly to the buildings in which the chickens are housed during the grow-out period. Title to the birds remains with the integrator throughout the grow-out phase.[2]

[2] Of the 57 grower contracts in use by petitioner's members and former members, 54 vest ownership of the broiler flocks placed with growers entirely in the members. One contract provides that the member and the grower shall have "joint ownership," and another that the member agrees "to sell broiler chicks" and "to sell to Grower the necessary feed, vaccines, medication, and sanitation products necessary to raise said birds to processing age." (R. 528). However, the latter contract further provides that "in the event of death of the birds at any time prior to the time they are picked up from the Grower's premises, Grower assumes any losses due to the expenditure of labor, use of land, facilities, equipment, and the cost of any fuel or litter. [Member] assumes the loss of the cost of the chicks, feed and other materials supplied by [member]." And undisputed affidavits establish that the title provisions in these two contracts are included only to accommodate financing.

The final contract is the one in use by a member which is itself a cooperative, whose membership includes persons engaged in growing broiler chickens which are processed and marketed cooperatively through their association. (R. 528). Membership of one producer's cooperative in another such cooperative, and federations of cooperatives, are authorized by the Capper-Volstead provision that "such associations may have marketing agencies in common." 7 U.S.C. § 291; see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

While most contracts with growers provide for full payment only with respect to live birds surviving to marketable age, mortality of birds during the grow-out phase of broiler production averaged only 3.26 percent in a survey of broiler flocks (R. 474).

As the owner and marketer of the birds, the integrator bears the primary risk of changes in prices due to market conditions. The government concedes that those conditions are typical of agricultural markets and in some cases even more difficult for producers to cope with than is true with respect to other agricultural commodities (R. 534). Fresh broilers, which constitute 90 percent of the broiler market, are a perishable commodity and must be marketed regardless of demand. The sellers are scattered and uninformed with respect to conditions of demand and supply, and consequently the market is highly susceptible to overproduction. Demand is both seasonal and cyclical. The buying side of the market is highly concentrated. (R. 534, 536). As a result of these conditions integrator profits are both unstable and low while the grower enjoys a stable return in the nature of a wage. (R. 478-481, 531).

The Formation of Petitioner and the Antitrust Litigation.

In 1969 the Antitrust Division of the Department of Justice issued a business review letter in which it indicated that the National Egg Company, a cooperative association of egg producers, would not forfeit its Capper-Volstead status if it admitted to membership an integrated egg producer that contracted out the care of laying hens in the same manner—described above—as broiler integrators contract out the growing-out of broiler chickens. On the basis of the Antitrust Division's position as articulated in this letter, petitioner association was formed in 1970 (R. 525).

The Justice Department changed its view of the law in 1971 and two years later brought this suit. In the wake of the government suit more than 20 treble damage class actions were brought against petitioner and its members on behalf of virtually all the nation's purchasers of broiler chickens (other

than the ultimate consumer). These actions are pending at the district court level in the Fifth Circuit.[3]

In the present case the district court granted summary judgment for petitioner on the basis of the facts stipulated by the parties, concluding (App. B., *infra* at A-32):

> "The involvement of the members of the defendant association in the production of the broilers is sufficient to justify their classification as '[p]ersons engaged in the production of agricultural products as farmers . . .' within the meaning of the Capper-Volstead Act and to permit their claim to the antitrust exemption to the extent permitted by that statute."

The Court of Appeals for the Fifth Circuit reversed. Conceding that the question it had to decide—the Capper-Volstead status of an integrated poultry producer—was "novel," the court was unable to "conceive that the ordinary, popular sense of the word 'farmers' would fit broiler integrator companies. . . . Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership." App. A., *infra*, at A-13. The court stated (*id.* at A-13):

> "NBMA cautions us against a romantic view of agriculture and points out that agriculture has changed greatly from the Jeffersonian conception of the self-sufficient yeoman. We agree that agriculture has changed much. But the ordinary, popular meaning of the word 'farmer' has not. When the common run of people wish to speak of the broader spectrum of modern agriculture, the word generally used is 'agribusiness.' 'Farmer' still means what it meant in 1922—one who owns or operates a farm. . . . We believe the Capper-Volstead Act, with its listing of

[3] In Re: Chicken Anti-Trust Litigation, Civil No. C74-2454A (N.D. Ga.).

beneficiaries—farmers, planters, ranchmen, dairymen, nut or fruit growers—has a feeling, a cadence of meaning, that has no place for NBMA's member companies."

Reviewing the legislative history of the Capper-Volstead Act (which was enacted in 1922), the court emphasized the defeat of a proposed amendment (the Phipps amendment) that would have permitted sugar and other manufacturers to come under the shelter of the Act if they entered into pre-planting contracts with the farmers from whom they bought the agricultural products used in their manufacturing activities and the contracts gave the farmers a percentage of the manufacturer's price for the finished product. The court acknowledged "that there are differences between the contractual arrangement prevalent in the broiler industry and the arrangements that would have been covered by" the rejected amendment. App. A., *infra*, at A-18. But it concluded: "Reading farmers in its ordinary sense as meaning those who own or operate farms focuses the benefits of the Act more closely on the persons central to Congress's concern and it keeps subject to the antitrust laws those companies that prepare farm products for market." *Id.* at A-19.

REASONS FOR GRANTING THE WRIT

This is another case in which the increasingly aggressive enforcement of the antitrust laws by the Department of Justice has run head on into a regulatory scheme designed to subject an industry to a different standard from a purely competitive one. The industry here is a branch of agriculture. Historically the policy of competition that underlies the antitrust laws has been deemed inapplicable to agriculture because of the special economic conditions prevailing in that sector of the economy. As this Court stated in *Tigner v. Texas*, 310 U.S. 141, 145-147 (1940):

> "An impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. . . . At the core of all these enactments [including the Capper-Volstead Act, specifically cited by the Court] lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by the antitrust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process."

The Capper-Volstead Act, 7 U.S.C. §§ 291-292, enacted in 1922, authorizes the formation of nonprofit cooperatives of "persons engaged in the production of agricultural products as farmers," and exempts cooperatives so formed from Section 1 of the Sherman Act. The members of petitioner association are conceded to be "persons engaged in the production of agricultural products"; the sole question is whether they are "farmers" within the meaning of the Act. This question, as we shall show, is one of great importance to U.S. agriculture. It was decided below by the only court of appeals likely ever to have occasion to consider the question and that court's decision is both plainly

incorrect and based on an approach to statutory construction that this Court rejected just last Term in *Bayside Enterprises Inc. v. National Labor Relations Board*, — U.S. —, 97 S.Ct. 576 (1977). Moreover, the question presented is a pure issue of law which arises on stipulated facts and can be resolved with minimal burden on this Court. The practical and juridical importance of the question, the manner in which it was decided below, the infeasibility of relitigating it in another circuit, and the state of the record afford compelling reasons why this petition for certiorari should be granted.

1. Virtually all of the nation's output of poultry products is produced by integrated producers who contract out some services involved in the raising of their poultry to independent contractors known as growers. The members of petitioner association are producers of broiler chickens but the identical type of contract is used by producers of eggs, turkeys, ducks, and other poultry products. Hence the decision below, if it is allowed to stand, will exclude the vast bulk of the nation's poultry producers from the benefits of the cooperative movement in agriculture that the Capper-Volstead Act was designed to foster.

The broiler chicken industry alone is a vast one, with sales of $3 billion in 1976.[4] The sales of all poultry products that year were $7.1 billion.[5] It would be surprising if the Congress that carefully specified the inclusion within the protective scope of the Capper-Volstead Act of "nut growers" meant to forbid the poultry industry—a big part of U.S. agriculture even in 1922[6]—to form exempt marketing cooperatives. But that is

[4] U.S. Dep't. of Agriculture, Economic Research Service, *Poultry and Egg Situation*, 18 (June 1977).

[5] *Id.*

[6] See U.S. Dep't of Agriculture, Agricultural Marketing Service, *Agricultural Statistics* 1941 (tab. 1). Poultry and egg cooperatives were common even before 1920. See Knapp, *The Rise of American Cooperative Enterprise 1620-1920*, pp. 301-04 (1969).

the effect of the decision below, since integrated producers such as the members of petitioner association produce and market the vast majority of the nation's output of poultry products. To be sure, the court of appeals in dictum suggested that the growers whom the producers hire to provide services in the raising of their chickens may form Capper-Volstead cooperatives. But aside from the fact that the court's "ordinary, popular meaning" approach to the definition of "farmer" logically excludes the growers (who lack both "farmland" and title to the "crop"), they are a relatively unimportant factor in the production of poultry products, supplying elements accounting for less than 10 percent of the cost of production. The growers are analogous to hired help producing for the account of another—in this case, the integrated producers. It is the latter who own and market the broiler chickens and who the court of appeals held may not form exempt cooperatives of any kind.

2. The decision below, if allowed to stand, may bring about far-reaching changes in the organization of an important branch of American agriculture—quite apart from the possible consequences of the pending private damage actions for the industry's financial stability. The decision, in forbidding poultry producers to form exempt cooperatives, confronts them with two options. The first is to integrate forward into the grow-out phase, thereby transforming the growers from independent contractors into employees. See Tobin & Arthur, *Dynamics of Adjustment in the Broiler Industry* 36 (1964).[7] It is undisputed that if the integrated producers did this they would be "farmers" entitled to form marketing cooperatives.[8] The second option is for the pro-

[7] Already 9 percent of broilers are grown-out on company-owned rather than independent growers' facilities. U.S. Dep't of Agriculture, Economic Research Service, *Poultry and Egg Situation*, 43 (June 1977).

[8] An additional reason why they might do so is that preservation of their "farmer" status is important for tax as well as anti-trust reasons. See, *e.g.*, *United States v. Chemell*, 243 F.2d 944 (5th Cir. 1957) (integrator owners of a replacement hatchery held to qualify

ducers to forego the cooperative form. The first option would promote "agribusiness"—contrary to the purposes of the Capper-Volstead Act as perceived by the court of appeals below. The second would expose the industry to the very risk of excessive price fluctuations and market uncertainty that the Capper-Volstead Act and the cooperative movement were designed to reduce.[9] Either development would harm the consumer, and neither is likely to help anyone in the farm sector—even the contract grower. The Justice Department concedes that integrated broiler production has developed in areas of limited agricultural enterprise and has replaced or supplemented the incomes received by rural families from other sources (R. 539). The transformation of growers into employees, or the disbanding of marketing cooperatives of broiler producers, will not help those families.

3. The effects of the decision of the court of appeals will be felt beyond the poultry industry. The form of integration pioneered by poultry farmers is increasingly being imitated elsewhere in agriculture, notably in hog farming where integrated production, with contracting out of the grow-out phase, is emerging patterned on poultry farming;[10] and in cattle farming, where the Department of Agriculture is currently urging the formation of cooperatives analogous to petitioner association.[11]

---

as "farmers" within the meaning of Treas. Reg. 111, §§29.22(a)-7 and 29.22(c)-6); *Maple Leaf Farms, Inc.*, 64 T.C. 438 (1975) and *Garth*, 56 T.C. 610 (1971) (integrated duck and egg producers, respectively, held to come within the term "farmer" as used in Treas. Reg. § 1.471-6(a)). The court of appeals' decision in this case, based as it is on a conclusion that integrated poultry producers are not "farmers" in the "ordinary, popular sense," may encourage integrators to make the structural changes indicated in order to avoid jeopardizing valuable tax benefits.

[9] See note 14 *infra* and accompanying text.

[10] Roy, *Contract Farming and Economic Integration*, 12, 221-265 (2d ed. 1972)

[11] See note 17 *infra* and accompanying text.

The decision below casts a long shadow over developments such as these which may enhance still further the efficiency of U.S. agriculture, on which much of the world depends.

4. Consequences so far-reaching should not be allowed to flow from an unreviewed lower-court decision. Nor is the question presented the kind that can be permitted to simmer at the circuit level until a conflict between circuits is generated that makes Supreme Court review inescapable.[12] Since petitioner is the only national cooperative of broiler producers, this litigation will decide once and for all the broiler industry's entitlement to the protection of the Capper-Volstead Act. To be sure, a similar issue might arise in another circuit involving a different branch of poultry production—eggs, or turkeys, or ducks—or some other branch of agriculture altogether, such as hog or cattle farming. But the $3 billion broiler industry will have to comply with the decision below. Any restructuring of the industry necessitated by that decision will not be deferred to await the outcome of possible litigation in another circuit that might eventually result in this Court's vindicating the Capper-Volstead rights of poultry producers. An additional consideration is that the stipulation of the facts in this case, and the exclusion of all issues other than the pure issue of law presented by the court of appeals' construction of the term "farmer" in the Capper-Volstead Act, establish ideal conditions for this Court to exercise its fundamental responsibility for the construction of federal statutes.

5. The exercise of that responsibility is all the more urgent because the court of appeals below employed an unsound method of statutory construction to reach an erroneous result. The court applied a standard of "ordinary, popular meaning" to limit the word "farmer" as it appears in the Capper-Volstead

---

[12] See Casper & Posner, *The Workload of the Supreme Court* 86 and n. 22 (1976).

Act to persons engaged in a narrow, stereotyped, and anachronistic conception of farming. Yet it is plain both from the context of the term "farmer" in the Act and its legislative history that it was intended to be a term of extension rather than of limitation. The enumeration of farmer, planter, rancher, dairyman, and nut or fruit grower was designed to prevent a narrow reading of "farmer" from curtailing the scope of the Act; it was not intended to be exhaustive but rather "descriptive of the general subject". 62 Cong. Rec. 2052 (1922). "The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provisions of the bill." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921). An opponent of the bill described it, without contradiction, as embracing "all of those who have anything to do with raising anything from the soil or from the farm" (62 Cong. Rec. 2173 (1922)). Thus it was explicitly stated that the Act embraced gardeners and plantation owners as well as the listed categories of agricultural producers. 62 Cong. Rec. 2052, 2172 (1922); note 13 *infra*. There is no basis for reading the Act as excluding producers of broiler chickens.

This is further shown by the legislative treatment of two important issues in the definition of "farmer". The first is whether a corporation engaged in agricultural production is a farmer within the meaning of the Act. It is. *E.g., Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967). Yet in popular parlance a farmer is a natural person. The second question is the status of owner and tenant under a sharecropping arrangement. The legislative history makes crystal clear that the landowner whose land is farmed by tenant farmers is a "farmer" within the meaning of the Act.[13] In the typical sharecropping

[13] "Mr. Lyman . . . [I]f there are certain planters in the South with large plantations, probably with a number of tenants on their places, who want to belong to these associations, I think that those owners should come under this . . .

"Senator Walsh of Montana. Exactly . . ."
Hearings on H.R. 2373 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 1st Sess. 195 (1921).

arrangement, the owner contributes land, fertilizer, and seeds and the tenant farmer his labor, and the parties split the proceeds from the sale of the crop 50-50. The equal division of the revenue implies an equal contribution to the cost of raising the crop. If the landowner is a "farmer" under the Capper-Volstead Act, though he incurs only 50 percent of the cost of producing the crop, *a fortiori* the broiler integrator—who incurs more than 90 percent of the cost of producing a broiler chicken —is a farmer.

The court below forgot that a statute's "general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States v. Whitridge*, 197 U.S. 135, 143 (1905) (per Holmes, J.). Consideration of statutory purpose confirms that the integrated broiler producer is indeed a farmer. He bears the primary risk of market fluctuations; this risk is a principal theme in the legislative history of the Capper-Volstead Act.[14] He owns the crop. Even during the grow-out phase, when the grower has physical custody, it is the integrated producer who supplies feed and other supplies, monitors the growers' activities, and assumes most of the risk of market changes. As mentioned, the integrated producer incurs more than 90 percent of the total cost of producing broilers. Although he does not own farmland, neither does the grower: broiler chickens are raised in buildings rather

[14] The Congressman who debated the bill were united in their concern about "the instability of agricultural prices, the rapid and absurd fluctuations to which they are subjected" (61 Cong. Rec. 1041 (1921)), the need for "stabilizing the market" (62 *id.* 2059 (1922)), and the "hazardous" character of agricultural production (62 *id.* 2060 (1922)). See also 61 *id.* 1042 (1921); 62 *id.* 2052, 2262 (1922).

than left to wander through the barnyard. If a farmer must have farmland to be within the Capper-Volstead Act, there are no poultry farmers. It is to such absurdities that the "ordinary, popular meaning" standard applied by the court of appeals logically leads.

The court of appeals below attached undue significance to occasional paeans to the small farmer that appear in the legislative history of the Act. A fair reading of that history reveals that the Act's supporters were proponents not of small farmers but of agriculture generally. As one supporter of the bill stated, "The farmer is a business man. . . . Agriculture is the biggest of all business." 62 Cong. Rec. 2217 (1922) (remarks of Senator Townsend). See also 62 *id.* 2172 (1922). What was deplored was not "agribusiness" but rather the obstacles that the antitrust laws were believed to place in the way of the farmer's utilizing businesslike methods to market his output.[15] See, *e.g.*, 62 Cong. Rec. 2218 (1922). If the broiler integrator took over the entire grow-out phase, transforming the contract growers into his employees, he would be even more of an agribusinessman—but he would concededly be a "farmer" within the meaning of the Capper-Volstead Act (see p. 11, *supra*).

Especially questionable is the court of appeals' reliance on the defeat of the Phipps amendment. The amendment would have permitted firms that manufactured sugar from beets (or textiles from cotton) to form exempt marketing cooperatives if they had pre-planting contracts with their agricultural suppliers whereby the supplier would receive a percentage of the manufacturer's price for his finished product. See 62 Cong. Rec. 2227, 2273 (1922). So far as appears, the proposed amendment was rejected solely because Congress did not wish to exempt the producers of any nonagricultural product—such as

---

[15] Suggestive in this regard is the Congressmen's preference for the term "agriculturist" over "farmer". See *e.g.*, 62 Cong. Rec. 2263 (1922).

manufactured sugar and textiles—from Section 1 of the Sherman Act. But broiler chickens are conceded to be an agricultural product. The integrated broiler producer is not a manufacturer of some nonagricultural finished product who buys an agricultural input from a farmer; he is the producer of an agricultural product who delegates a small part of the production to another agricultural producer, the contract grower.[16]

6. In *Bayside Enterprises, Inc. v. National Labor Relations Board*, — U.S. —, 97 S.Ct. 576 (1977), this Court last term held that certain truck drivers employed by integrated poultry producers were not "agricultural laborers" within the meaning of the Fair Labor Standards and National Labor Relations Acts. In so holding the Court gave controlling weight to the interpretation of the responsible administrative agency, in that case the Labor Board. Because of the different structure of administration of the Capper-Volstead Act from that of the labor statutes, there is no formal administrative interpretation of the applicability of the Capper-Volstead Act to integrated broiler producers. However, the practical construction of the Act by the responsible public agencies makes clear that integrated broiler producers are indeed farmers within the meaning of the Act. The Department of Agriculture assisted in the formation of petitioner association and has worked closely with it.[17] Consistent with the uniform understanding of the federal

---

[16] The statement in the court of appeals' opinion that "a few [of petitioner's members] operate only processing plants" (App. A., *infra*, at A-4) is contrary to the conceded facts which show that *all* members of petitioner assume major responsibility for their grow-out operations and full responsibility for most if not all other operations involved in broiler production. (See, *e.g.*, R. 527-529).

[17] Affidavit of Bob M. Anthony (in record certified to this Court but not printed in joint appendix), at p. 6. The Department of Agriculture continues to encourage the formation of cooperative associations of producers who contract out various production functions—including the "grow-out" phase of beef production. See Ward "Integrated Cattle Marketing—A Better Way," U.S. Dep't of Agr., Farmer Cooperative Serv., FCS Info. 107, May 1977, which is appended hereto as App. E, *infra*, at A-38.

agricultural agencies, the Farm Credit Administration recently recognized the legitimacy of petitioner's status as a cooperative of agricultural producers by approving its eligibility to borrow from the New Orleans Bank for Cooperatives,[18] pursuant to statutory standards materially identical to those of the Capper-Volstead Act. See 12 U.S.C. § 2129.

The court of appeals' refusal to accord any weight to the practical construction of the statute by the Department of Agriculture and the Farm Credit Administration was a particularly serious error because of the private antitrust damage liability to which cooperative members are exposed if they guess wrong as to the meaning of the Act,[19] and the absence of any procedure for obtaining a formal administrative determination of eligibility. The members of the petitioner association have been laid open to massive potential liability by virtue of having formed a cooperative with the blessing of both the Department of Agriculture and the Department of Justice. Elementary fairness and the logic of the Court's decision in **Bayside** required that the court of appeals below should have given controlling, rather than zero, weight to the agricultural agencies' practical construction that integrated broiler producers are farmers within the meaning of the Capper-Volstead Act.

---

[18] Affidavit of Bob M. Anthony, *supra* note 17, at p. 17.

[19] A consideration stressed by this Court in previous decisions construing the Capper-Volstead Act. See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962); *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 397 (1967) (separate opinion of Harlan, J.).

CONCLUSION

The question presented vitally affects a major industry. Its resolution by the court of appeals below, if allowed to stand, may lead to far-reaching changes in that industry, harmful to both consumer and farmer, and perhaps in other branches of agriculture as well. Review of the question by this Court cannot properly be deferred to some subsequent case raising the same or a similar issue. Moreover, the decision below is based on an unsound and discredited theory of statutory construction and is plainly incorrect.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
1200 Citizens and Southern
National Bank Building
35 Broad Street
Atlanta, Georgia 30303
(404) 588-0300

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637
Counsel for Petitioner

APPENDIX

APPENDIX A

(Corrected)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

NATIONAL BROILER MARKETING ASSOCIATION,
Defendant-Appellee.

No. 76-2115.

United States Court of Appeals,
Fifth Circuit.

April 22, 1977.

Government brought antitrust action against association of companies which marketed broiler chickens. The District Court for the Northern District of Georgia, Albert J. Henderson, Jr., Chief Judge, dismissed and Government appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that broiler integrators which performed many of the tasks necessary to bring broiler chickens to consumers but which did not actually grow the chickens, instead contracting that job out to growers, were not "farmers" for purposes of the Capper-Volstead Act exemption from the antitrust laws for farm cooperatives.

Reversed.

1. **Monopolies Key 17(4)**

Even cooperatives which come within the protection of the Capper-Volstead Act do not thereby obtain complete antitrust immunity. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

2. **Statutes Key 188**

Words in statute should be given their ordinary, popular meaning unless Congress clearly meant the words to have some more technical meaning.

3. **Monopolies Key 17(4)**

Broiler integrator companies which had taken on more than one of the tasks necessary to bring broiler chickens to consumers but which had not performed the actual raising of the broiler chicks to maturity, instead allowing that activity to be handled by contract growers who were paid for growing the chickens, title to which remained in the broiler integrators, were not "farmers" for purposes of the Capper-Volstead Act exemption from the antitrust laws for farmers cooperatives. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

See publication Words and Phrases for other judicial constructions and definitions.

4. **Monopolies Key 17(4)**

As used in the Capper-Volstead Act, the term "farmer" still means what it meant in 1922, i.e., one who owns or operates a farm. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

5. **Monopolies Key 17(4)**

Purposes of the Capper-Volstead Act were to improve the bargaining position of farmers vis-a-vis corporate middlemen in order to increase farm income and to stop the rise of tenancy and the migration of farm families to the cities; Congress did not intend that benefits afforded to farmers by the Act be extended to include the corporate entities with which farmers dealt. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

6. **Statutes Key 184**

When a court takes account of changed reality in interpreting statutes, the goal remains effectuation of congressional purpose, not alteration of it.

Appeal from the United States District Court for the Northern District of Georgia.

Before MORGAN and HILL, Circuit Judges, and NOEL,* District Judge.

LEWIS R. MORGAN, Circuit Judge:

We must decide whether broiler industry companies that neither own nor operate farms can be "farmers" within the meaning of a 1922 federal statute called the Capper-Volstead Act,[1] which gives farmers' cooperatives some measure of protection from the antitrust laws. The question is a novel one. After careful study of the Act and its legislative history, we are convinced that Congress's purpose in enacting Capper-

---

* Senior District Judge of the Southern District of Texas sitting by designation.

[1] 7 U.S.C. §§ 291-92.

Volstead does not mandate or permit protection of these broiler industry companies from the proscriptions of the antitrust laws. The district court held otherwise, and we reverse.

I. FACTS

A. *The Broiler Industry*

Broilers are young chickens that are slaughtered when seven-to-nine weeks old, then processed and offered for sale ready-to-cook. The broiler industry comprises generally two types of entities—integrator companies and contract growers. The defendant National Broiler Marketing Association (NBMA) is composed of integrator companies.

"Integrators" have that name because over the years they have accomplished what is called the vertical integration of much of the broiler industry. That is, they have taken on more than one of the tasks necessary to bring broilers to consumers. Thus, many NBMA members[2] own and operate not only processing plants, but also feed mills, hatcheries, and breeder flocks (for the production of broiler eggs). Still, most NBMA members are processors, and a few operate only processing plants.

The one major operation not generally performed by the integrator firms is the actual raising of the broiler chicks to maturity. This is handled by farmers called contract growers. These growers raise the chicks on their own farms in their own buildings. They provide their own labor and equipment. The growers also supply the water and electricity needed during the grow-out process, as well as the litter and fuel used in lining and heating the broiler houses. The day-to-day husbandry of the flocks is left to the growers.

[2] This also includes companies owned by NBMA members or companies commonly owned with NBMA members.

Title to the broiler chicks is retained by the broiler integrators during the grow-out process. The integrators also supply feed and veterinary services. The integrators decide the number and timing of chick placements and the age and size at which the birds will be marketed.

Generally, the growers are treated by the integrators as independent contractors. The contracts provide for a minimum and maximum payment per bird or per pound to the grower.[3]

B. *The Litigation*

The government brought a civil antitrust action[4] against NBMA, alleging that the Association's members and others had combined to fix broiler prices and to restrict broiler production in order to increase broiler prices. After a period of discovery, both parties moved for partial summary judgment on agreed facts. The issue was whether NBMA's members are farmers within the meaning of the Capper-Volstead Act, which states generally that "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" may engage in certain activities cooperatively.[5]

[3] The minimum payment provided in some contracts is less than the cost incurred by the average grower in raising a flock of broilers. Ordinarily, NBMA members are free to lower the payment scale under their contracts with growers before any new flock is grown in response to rising feed costs or falling market prices for broilers. Members are also free to reduce the number of broilers or flocks placed with growers in response to market conditions. Members are usually free to terminate their contracts with growers after any flock and in fact have done so for a variety of reasons.

[4] The action was brought under section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain alleged violations of section 1 of that Act, 15 U.S.C. § 1.

[5] The full text of the Act is as follows:

§ 291. Authorization of associations; powers

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers

may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such association may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

§ 292. *Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure*

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a

[1] The district court held that NBMA's members are farmers as the term is used in the Act and granted NBMA's motion for

certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction, or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

7 U.S.C. §§ 291-92.

Eight years prior to passage of the Capper-Volstead Act, Congress enacted section 6 of the Clayton Act, 15 U.S.C. § 17:

§ 17. *Antitrust laws not applicable to labor organizations*

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

This was the first Congressional action to protect cooperative endeavors from the antitrust laws. Capper-Volstead's effect was "to clarify the exemption for agricultural organizations and to extend it to cooperatives having capital stock." *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391, 88 S.Ct. 528, 532, 19 L.Ed.2d 621 (1967).

partial summary judgment.[6] Then the government, with NBMA's acquiescence, filed an amended complaint, deleting all of the allegations that survived the partial summary judgment.[7] The parties stipulated that the government would be allowed to bring a later action reviving those allegations.

The district court granted final judgment in favor of NBMA,[8] and the case is here on the government's appeal of the district court's final order.

II. DISCUSSION

We have noted already that the issue we must decide today is novel. In fact, the Capper-Volstead Act, since its enactment in 1922, has received little attention from the Supreme Court.[9]

---

[6] *United States v. National Broiler Marketing Ass'n*, 1975—2 CCH Trade Cases ¶ 60,509 (N.D.Ga. Aug. 26, 1975).

[7] Even cooperatives that come within the protection of Capper-Volstead do not thereby obtain complete antitrust immunity. *See Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960); *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

[8] *United States v. National Broiler Marketing Ass'n*, 1976—1 CCH Trade Cases ¶ 60,801 (N.D.Ga. Mar. 16, 1976).

[9] The Supreme Court's most recent decision interpreting Capper-Volstead is *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967), in which the Court held that the Sunkist cooperative could not qualify for the exemption because some of its members were packing houses that contracted with fruit growers to handle the growers' fruit for cost plus a fixed fee. 389 U.S. at 387, 88 S.Ct. 528. The Supreme Court in *Case-Swayne* emphasized that the legislative history of Capper-Volstead made clear Congress's purpose to limit the shelter of the Act to actual growers. *Id.* at 391-93, 88 S.Ct. 528. Thus, the Court concluded that "Congress did not intend to allow an organization with such nonproducer interests [*i.e.*, the packing houses] to avail itself of the Capper-Volstead exemption." *Id.* at 395-96, 88 S.Ct. at 535.

The instant case is a logical successor to *Case-Swayne*. In *Case-Swayne*, the Supreme Court had little difficulty concluding that the packing houses were not farmers. Here, entities somewhat analogous to the packing houses, broiler integrators, assert that they are farmers for the reasons stated in the text *infra*.

Moreover, no significant body of Capper-Volstead law has developed in the lower federal courts.[10] And the legal commentary has not been abundant.[11]

The remaining Supreme Court decisions about Capper-Volstead are *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962) (several cooperatives may join together as one organization without losing Capper-Volstead protection); *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960) (Capper-Volstead not a license for farmers' cooperatives to engage in predatory practices otherwise violative of section 2 of Sherman Act); and *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939) (cooperative's combination with nonproducers not protected by Capper-Volstead; Capper-Volstead section 2 not exclusive remedy for cooperatives's anti-competitive conduct).

See also Tigner v. Texas, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124 (1940) (state antitrust law that exempts agriculture enterprises does not violate federal Constitution); *Frost v. Corporation Commission*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929) (Brandeis, J., dissenting) (discussion of cooperative movement); *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473 (1928) (statute making illegal the witting interference with contract between farmer and cooperative not violative of federal Constitution).

[10] The court of appeals and district court decisions treating Capper-Volstead either reached the Supreme Court, *see* note 9 *supra*, or are fairly routine applications of the principles announced in the Supreme Court opinions, *e. g.*, *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976) (applying *Borden* and *Maryland & Virginia Milk Producers*); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999, 95 S.Ct. 314, 42 L.Ed.2d 273 (1974) (potato marketing associations' activities qualified as marketing within the meaning of CapperVolstead); *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) (applying *Maryland & Virginia Milk Producers*); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F.Supp. 984 (N.D.Cal. 1976) (Capper-Volstead protects price-fixing by cooperative even when not incident to other collective activity); *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 355 F. Supp. 408 (D.C.Cal. 1971) (restructured Sunkist comes within Capper-Volstead).

[11] *See generally, e. g.*, J. von Kalinowski, 16F Business Organizations (Antitrust Laws & Trade Regulation) §§ 51.01 to -.06 (1976); Hanna, *Antitrust Immunities of Cooperative Associations*, 13 Law &

The positions of the parties may be stated briefly. The government contends that Congress clearly meant to limit the benefits of the Capper-Volstead Act to persons that own or operate farms. The government argues that this interpretation comports with the ordinary meaning of the word "farmers" and with the central themes of the legislative history of the Act. The record reflects and NBMA concedes that some of its members neither own nor operate any farms on which broilers are raised to maturity.

NBMA counters that "farmers" ought to be read "in a realistically broad sense."[12] Deemphasizing "farmers," but clearly aware that the term "farmers" is the slipper that must fit the foot, NBMA argues that Congress intended to afford Capper-Volstead's protection "to all persons actually engaged in the production of agricultural products."[13] NBMA urges that its members are so engaged principally because they own the chicks, furnish the feed, and share in the risks that attend broiler production.

Contemp. Prob. 488 (1948); Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 Admin.L.Rev. 455 (1969-70); *Lemon, The Capper-Volstead Act—Will It Ever Grow Up*, 22 Admin.L.Rev. 433 (1969-70); Mahaffie, *Cooperative Exemptions Under the Antitrust Laws: A Prosecutor's View*, 22 Admin.L.Rev. — (1969-70); Mischler, *Agricultural Cooperative Law*, 30 Rocky Mtn.L.Rev. 381 (1958); Noakes, *Exemption for Cooperatives*, 19 ABA Antitrust Section 407 (1961); Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA Antitrust Section 313 (1961); Saunders, *The Status of Agricultural Cooperatives Under the Anti-Trust Laws*, 20 Fed.B.J. 35 (1960).

[12] Brief for NBMA at 42. *But see Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967). In Case-Swayne, the Supreme Court characterized Capper-Volstead as constituting "special exceptions to a general legislative plan," *id.* at 393, 88 S.Ct. at 533 and further spoke of the Act as a "limited" exemption, *id.* at 391 n. 8, 88 S.Ct. 528.

[13] Brief for NBMA at 22.

Neither of the interpretations seems on its face wholly irrational. Our task is to decide which of the two is the more congenial to the language and purpose of Capper-Volstead.

A. *The Words Congress Used*

We begin with the words of the statute.[14] Congress granted a measure of protection from the antitrust laws to "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . .". NBMA focuses on the first part of the clause—persons engaged in the production of agricultural products—as the key to the Act's coverage. It seems clear, however, that the universe of persons engaged in the production of agricultural products can be larger than the universe of those so engaged as farmers, planters, ranchmen, dairymen, nut or fruit growers.[15] The test, then, is whether broiler integrator firms are *farmers*.

---

[14] *Dupuy v. Dupuy*, 511 F.2d 641, 642 (5th Cir. 1975).

[15] The legislative history of Capper-Volstead, discussed *infra*, shows a genuine Congressional concern that the statute not be as broad as a liberal construction of "production" might allow. In *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967), the Supreme Court noted this concern, quoting from a floor debate exchange involving Senator Kellogg, a principal sponsor of the measure:

> "Mr. CUMMINS . . . . Are the words 'as farms, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?
>
> "Mr. KELLOGG. I think they are descriptive of the general subject. I think 'farmers' would have covered them all.
>
> "Mr. CUMMINS. I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend

[2] What meaning are we to place on the word "farmers"? It is long settled that words in statutes should be given their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense.[16] Mr. Justice Frankfurter stated the point well:

> [L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944). Of course we cannot take a poll to determine the ordinary, popular meaning of the word "farmers." And our confidence in the dictionary for this purpose is not great.[17] We are left to our judgment, informed by the whole of our experience.

---

by this bill to confer upon them the privileges which the bill grants, I assume?

"Mr. KELLOGG. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.

"Mr. TOWNSEND. They must be persons who produce these things.

"Mr. KELLOGG. Yes; that has always been the understanding."

389 U.S. at 392, 88 S.Ct. at 533, *quoting* 62 Cong.Rec. 2052 (1922).

[16] *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968); *Malat v. Riddell*, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966).

[17] The relevant definitions of the word "farmer" in *Webster's Third New International Dictionary* (1964) include "a person who cultivates land or crops or raises livestock," "one that rents or leases land for cultivation," and "a person whose primary occupation is the raising of crops or livestock." *Id.* at 824.

[3] We cannot conceive that the ordinary, popular sense of the word "farmers" would fit broiler integrator companies. The husbandry of the broiler flocks is carried out neither by these firms nor by their employees, but by the contract growers. The farms where the husbandry is done are owned not by NBMA members or their employees, but by these growers. Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership. Given the absence of both of these elements here, none of the factors suggested by NBMA as indicative of farming nor all of the factors together would seem a sufficient shoe horn to squeeze these companies into farmers' boots. Asked to examine the broiler business and to identify the "farmers," Justice Frankfurter's common run of men, we think, would point to the contract growers —the persons who own and operate the farms—as the "farmers."

[4] NBMA cautions us against a romantic view of agriculture and points out that agriculture has changed greatly from the Jeffersonian conception of the self-sufficient yeoman. We agree that agriculture has changed much. But the ordinary, popular meaning of the word "farmer" has not. When the common run of people wish to speak of the broader spectrum of modern agriculture, the word generally used is "agribusiness." "Farmer" still means what it meant in 1922—one who owns or operates a farm.

Mr. Justice Holmes observed once that "the meaning of a sentence is to be felt rather than to be proved . . .". *United States v. Johnson*, 221 U.S. 488, 496, 31 S.Ct. 627, 55 L.Ed. 823 (1911). We believe the Capper-Volstead Act, with its listing of beneficiaries—farmers, planters, ranchmen, dairymen, nut or fruit growers—has a feeling, a cadence of meaning, that has no place for NBMA's member companies.

B. *The Legislative History*

Our examination of the legislative history of Capper-Volstead has only reinforced our conviction that Congress meant "farmers" to be read in its ordinary sense, as urged by the government, rather than in an imaginative, broad sense, as urged by NBMA.

[5] The Act's legislative history carries two dominant themes. Congress meant to improve the bargaining position of farmers vis-a-vis corporate middlemen in order to increase farm income and, importantly, to stop the rise of tenancy and the migration of farm families to the cities. Second, Congress was convinced that the benefits afforded to farmers by Capper-Volstead should not be extended to include the corporate entities with which farmers dealt.

The Congressional concern for the weak bargaining position of the individual farmer was emphasized in the House Report:

> Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price he is threatened with prosecution.[18]

This point was reiterated in the upper chamber's debates. Senator Kellogg, the floor manager of the legislation, spoke of the farmer as "a small holder of land" whose "means and . . . opportunities are not sufficient to allow him to take any steps whatever in placing his products with the ultimate consumer or, usually, with the middleman."[19] Thus, Congress's purpose in enacting Capper-Volstead was, as Mr. Justice Black observed, to give "individual farmers . . . through agricultural cooperatives

[18] H.R.Rep.No.24, 67th Cong., 1st Sess. 2 (1921).

[19] 62 Cong.Rec. 2050 (1922).

acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." *Maryland & Virginia Milk Producers Association v. United States*, 362 U.S. 458, 466, 80 S.Ct. 847, 853, 4 L.Ed.2d 880 (1969).

NBMA suggests that the purpose of Capper-Volstead was to make farming reliably profitable and to assure the nation a stable supply of wholesome food. This characterization is incomplete and therefore misleading. Congress meant to make farming reliably profitable in order to insure the occupational survival of small scale agriculturalists who were "widely scattered and inured to habits of individualism . . .".[20] By 1922 farming's unprofitability had sent thousands of farmers to the cities to find work.[21] Congress feared that the system of small, individually owned farms would be unable to survive. Senator Kellogg stated this apprehension during the floor debates: "In my opinion, the greatest concern confronting the statesmen of the country is the tendency to drift to the cities, the decline of agriculture, the increase of landlordism and tenancy."[22] Senator Capper reiterated the point:

[20] The quoted language is from *Tigner v. Texas*, 310 U.S. 141, 145, 60 S.Ct. 879, 881, 84 L.Ed. 1124 (1940) (Frankfurter, J.).

[21] *See* 62 Cong.Rec. 2218 (1922) (remarks of Sen. Calder).

[22] 62 Cong.Rec. 2051 (1922).

In the 1955 report of the Attorney General's National Committee to Study the Antitrust Laws, the chief reasons for protection of certain agricultural activities from the antitrust laws were listed. First among these was "preservation of the family farm as the primary unit of agricultural production." The report also listed assurance of an adequate supply of agricultural products and "the need for offsetting the weakness of the individual farmer faced with greater bargaining power in the markets where he buys and sells." J. von Kalinowski, 16F Business Organizations (Antitrust Laws and Trade Regulation § 51.01[1], at 51-3 n. 3 (1976)), *quoting* Att'y Gen. Rep. 306 (1955).

> During the last decade of the 19th century and the early decades of the 20th, mortgage indebtedness rose sharply, and

> Mr. President, every statesman looks forward to a condition as ideal when the whole country will be dotted with small farms, each operated by its owner. Every statesman deplores the spread of tenantry and insists that best citizenship can be developed only upon the individual system of farm production. Because of his peculiar characteristic of agriculture, the growers have never been able to adopt a corporate form of organization; they have, therefore, gradually fitted into the cooperative form of organization, which maintains individuality of production but enables them to unite for marketing purposes.[23]

Cooperation among farmers thus was seen as the best solution to the farmers problems because it allowed them to band together without sacrificing their social and economic individualism. The House Report, for example, rejected the corporate mechanism as the farmers' redemption:

> It is no answer that farmers may acquire the status and secure the rights of a business corporation by deeding their farms to a corporation. That is neither practical nor desirable from any standpoint.[24]

Senator Kellogg agreed:

---

there was a dramatic growth in the amount of farm tenancy in the country. By the end of the 1920s, a large percentage of the nation's farmers no longer owned the land they worked. Tenancy rates were exceptionally high in the specialized cash-crop areas of the country. In the eastern and western Cotton Belts, over two-thirds of all farmers were tenants, and in the wheat and corn belts, approximately two-fifths farmed land they did not own.

Conrat & Conrat, How U.S. Farmers Became Specialists—in Cash and Debts, *Smithsonian* 54 (Mar. 1977).

[23] 62 Cong.Rec. 2058 (1922).

[24] H.R.Rep.No.24, 67th Cong., 1st Sess. 2 (1921).

> Mr. President, of course, the farmer can not consolidate his land into great holdings or into corporate ownership, and he should not do so. The hope of this Nation, the hope of any nation, the hope of the independence and the prosperity of our people, our very civilization, depends upon the individual ownership and proprietorship of the soil.[25]

A corollary to Congress's purpose to strengthen the position of farmers vis-a-vis middlemen was Congress's resolve to leave fully subject to the antitrust laws those companies with which farmers dealt. For example, the Senate rejected[26] an amendment[27] proposed by Senator Phipps that would have extended the shelter of Capper-Volstead to companies such as sugar refineries that entered into pre-planting contracts with farmers. Senator Phipps's proposal generated this exchange on the floor:

> Mr. KELLOGG. Mr. President, I hope this amendment will not be adopted. It permits any manufacturer who converts a product into a finished commodity where the price paid by the manufacturer to the producer is controlled by or dependent upon the price received by the manufacturer for the finished product to enter into any combination he sees fit. *Of course, if they make contracts with the producers of the raw materials, the packers, the sugar manu-*

---

[25] 62 Cong.Rec. 2051 (1922).

[26] 62 Cong.Rec. 2275 (1922).

[27] The amendment would have inserted the following language after "nut or fruit growers":

> and where any such agricultural product or products must be submitted to a manufacturing process, in order to convert it or them into a finished commodity, and the price paid by the manufacturer to the producer thereof is controlled by or dependent upon the price received by the manufacturer for the finished commodity by contract entered into before the production of such agricultural product or products, then any such manufacturers may.

62 Cong.Rec. 2273 (1922).

facturers, or anybody manufacturing anything where the raw product is produced on the farms can combine under this bill.

If the Senate wishes absolutely to defeat the bill, it ought to adopt this amendment; otherwise not.

Mr. PHIPPS. Mr. President, will the Senator yield?

Mr. KELLOGG. I yield.

Mr. PHIPPS. I desire to call attention to the fact that this amendment is limited to cases where the manufacturer enters into a contract with the producer before the produce has been grown.

Mr. KELLOGG. I can answer that. That is perfectly easy to do. *The packers could enter into contracts, the cotton mills could enter into contracts; and I hope the Senate will defeat the amendment.*[28]

Although we concede that there are differences between the contractual arrangement prevalent in the broiler industry and the arrangements that would have been covered by the Phipps Amendment, we are convinced that the nature of the opposition to that Amendment is instructive here as evidence that the Capper-Volstead Congress would not have considered NBMA integrators "farmers," but instead would have grouped them with the packers, the cotton mills, and the sugar refineries.

Congress's determination to circumscribe carefully the coverage of the Act is reflected in other parts of the legislative history as well. For example, the House Report stated:

> Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed

[28] 62 Cong.Rec. 2274 (1922) (emphasis added).

> to exclude from the benefits of this legislation all but actual farmers . . .[29].

Reading "farmers" in its ordinary sense as meaning those who own or operate farms focuses the benefits of the Act more closely on the persons central to Congress's concern and it keeps subject to the antitrust laws those companies that prepare farm products for market.

C. *The Fabric of Other Law*

The language and legislative history of Capper-Volstead support the government's position. NBMA contends, however, that the government's reading of "farmers" is at odds with the treatment of broiler integrators and similar entities under other statutes and regulations.[30] The contention is unavailing. First, broiler integrators and like companies have not fared nearly so well under other statutory schemes as the NBMA contention suggests.[31] Second, none of the other statutes or regulations

[29] H.R.Rep.No.24, 67th Cong., 1st Sess. 1 (1921). And see note 15 *supra*.

[30] Representative of the decisions cited by NBMA are *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969) (Fair Labor Standards Act); *United States v. Chemell*, 243 F.2d 944 (5th Cir. 1957) (Treasury Regulations); and *Agricultural Transport Ass'n v. United States*, 274 F.Supp. 528 (N.D.Tex.1967) (Interstate Commerce Act). NBMA also mentions a decision of the New Orleans Bank for Cooperatives to extend credit, Brief for NBMA at 47; a decision of the Secretary of Agriculture regarding a turkey marketing order, 27 Fed.Reg. 3326-54 (1962); a Cost of Living Council Decision, Brief for NBMA at 50; and a recent state court decision in Maine, *Maine Agricultural Marketing Ass'n v. Maplewood Poultry Co.*, Civ.No. 559 (Super.Ct.Me., Kennebec SS. 1971).

[31] In addition to the Fair Labor Standards Act decisions cited in the text, *infra, see, e.g., Parks v. Federal Crop Ins. Corp.*, 416 F. 2d 833 (7th Cir. 1969); *United States v. Elm Spring Farm, Inc.*, 38 F.Supp. 508 (D.Mass. 1941), *modified on other grounds*, 127 F.2d 920 (1st Cir. 1942).

mentioned by NBMA involves the important national commitment to free competition embodied in the antitrust laws.[32] We are wary of transplanting results from one statutory scheme to another, because policies may vary, and even where policies seem the same, different countervailing interests may affect the extent to which Congress intends to effectuate the policies.[33]

NBMA relies heavily on results under the Fair Labor Standards Act (FLSA)[34] and stresses particularly a panel decision of this court, *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969). In *Strain*, we held that a broiler integrator was a raiser of poultry within the meaning of the agricultural exemption in the FLSA.[35] The *Strain* decision is no longer good law. In *Bayside Enterprises, Inc. v. NLRB*, — U.S. —, 97 S.Ct. 576, 50 L.Ed.2d 494 (1977), the Supreme Court held that the National Labor Relations Board's position on the issue must be sustained. The NLRB squarely and consistently has held:

> when an employer contracts with independent growers for the care and feeding of the employer's chicks, the em-

[32] *See e. g., Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967).

[33] *See United States v. Sisson*, 399 U.S. 267, 297-98, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970); *United States v. Stewart*, 311 U.S. 60, 69, 61 S.Ct. 102, 85 L.Ed. 40 (1940); *Lane v. Railroad Retirement Bd.*, 185 F.2d 819, 822 (6th Cir. 1950). In *FTC v. Bunte Bros.*, 312 U.S. 349, 61 S.Ct. 580, 85 L.Ed. 881 (1941), the Court stated:

> Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system.

Id. at 353, 61 S.Ct. at 582.

[34] 29 U.S.C. § 201 *et seq.*

[35] 29 U.S.C. § 203(f).

> ployer's status as a farmer engaged in raising poultry ends with respect to those chicks.

Imco Poultry, Division of International Multifoods Corp., 202 N.L.R.B. 259, 260 (1973). Thus, the government's interpretation of Capper-Volstead is consistent with the treatment accorded broiler integrators by the NLRB.

The Secretary of Labor long has held that employees of broiler integrators are not agricultural employees within the meaning of FLSA. A Labor Department regulation states:

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not 'raising of poultry' and employees engaged in them cannot be considered agricultural employees on that ground.[36]

We note these results under the labor laws because they show at least that the government's position is no aberration. To be sure, integrators have had some success in pressing their claim to be farmers.[37] It is sufficient answer that we find nothing in these results under different schemes that compels an interpretation of Capper-Volstead that is contrary to the interpretation suggested by the language and legislative history of the Act. Blind obeisance to consistency is no virtue if it takes us from our pri-

[36] 29 C.F.R. § 780.126.

[37] *See* note 30 *supra*.

mary duty to work the will of the elected representatives of the people, and such obeisance would be strange indeed here, as there is no real consistency to obey.

III. CONCLUSION

NBMA's position that the Capper-Volstead Act should be brought up to date to take account of the complex structure of modern agriculture[38] rests on fundamental misconceptions of the Congressional purpose revealed in the language and legislative history of the Act and of the role of the judiciary in a democratic society.

The language and legislative history of Capper-Volstead make quite clear that Congress had no purpose to shelter from the laws of free competition the whole spectrum of agricultural enterprise. We may be certain that even in 1922 the agricultural economy had begun to evolve into the intricate thing it now is, yet Congress carefully limited the benefits of the Act to "farmers," and the legislative history reinforces our inclination to give the word its ordinary meaning.

[6] When a court takes account of changed reality in interpreting statutes, the goal remains effectuation of Congressional purpose, not alteration of it. If there are good reasons why broiler integrators should be protected against the general national policy of free competition, then NBMA should present those reasons to Congress.[39]

REVERSED

---

[38] Brief for NBMA at 26, 31.

[39] Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.

Addision v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, versus NATIONAL BROILER MARKETING ASSOCIATION	Civil Action No. 18173

ORDER

This is an action by the United States against the National Broiler Marketing Association (hereinafter referred to as the "NBMA") for an alleged violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Jurisdiction is predicated on 15 U.S.C. § 4. Presently pending are the plaintiff's and defendant's motions for partial summary judgment focusing on the issue of whether NBMA is a cooperative association of agricultural producers exempt from the antitrust laws by virtue of Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, Section 6 of the Clayton Act, 15 U.S.C. § 17 and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455.

The defendant is a non-profit cooperative association, chartered by the State of Georgia since September 15, 1970 under the provisions of the Georgia Cooperative Marketing Act, Ga. Code Ann. §§ 65-201 *et seq.* While NBMA was originally established with capital stock, its articles of incorporation were amended on December 6, 1973 to authorize the conversion of the association to a non-profit membership organization. It is comprised of members that integrate the five stages

of the production of ready-to-cook broilers, including (a) the placement and raising of breeder flocks for the production of eggs for hatching purposes, (b) the hatching of eggs and placement of chicks, (c) the growth of chicks for a period of seven to nine weeks (also referred to as the "grow-out" stage), (d) cooping and hauling of the grown chickens to processing facilities, and (e) the operation of plants to process the broilers for market. All of the member firms, though, do not directly engage in all of these functions. In fact, many conduct one or more of these operations through subsidiaries, affiliated companies, partnerships, joint ventures, or independent contractual arrangements. Usually the chicks are "grown out" through arrangements with independent contractors, known as growers, who provide facilities and certain services necessary for the care of the chickens during this period.

The government contends that this practice of contract growing deprives the NBMA, and its members, of the agricultural exemption under the antitrust laws. The defendant, on the other hand, maintains that despite the arrangements with independent growers, it is entitled to the protection of Section 6 of the Clayton Act, the Capper-Volstead Act and Section 5 of the Cooperative Marketing Act of 1926.

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides that:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

This statute was passed in 1914. Eight years later, Congress enacted the Capper-Volstead Act, 7 U.S.C. § 291, which "was intended to clarify the [Clayton Act's] exemption for agricultural organizations and to extend it to cooperatives having capital stock." *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391 (1967). Therefore, the broad wording of Section 6 of the Clayton Act is limited by the language of the Capper-Volstead Act, and the latter is controlling in describing those entitled to the agricultural exclusion.

7 U.S.C. § 291 states:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

There is no dispute here that the NBMA is an association operated for the mutual benefit of its members, no member is allowed more than one vote because of the amount of stock or capital owned, and that the association does not pay dividends, stock or membership capital in excess of eight percent per annum. In addition, it is conceded that ready-to-cook broilers are agricultural products. The government and the defendant part company, though, over whether the members are engaged in the production of these products as farmers.[1]

The Capper-Volstead Act does not define the terms "engaged in production" or "farmers". Some assistance, although limited, is provided by the legislative history of this act. As the Supreme Court noted in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, *supra*, at 391:

> The reports on both H.R. 13931, the predecessor bill that failed of passage, and H.R. 2373, which became the Capper-Volstead Act, state:
>
> > Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members *as such producers*." (Emphasis added.) H.R. Rep. No. 24, 67th Cong. 1st Sess. 1 (1921); H.R. Rep. No. 939, 66th Cong. 2d Sess. 1 (1920).

[1] The government also denies the NBMA's assertion that the association does "not deal in the products of non-members to an amount greater in value than such as are handled by it for members," as required by the Capper-Volstead Act. The government takes the position that the broilers are not products of the members. This is essentially a restatement of the main argument that the members are not "producers" of agricultural products.

However, the characteristics necessary to qualify as an actual "producer" or "farmer" cannot be adequately discerned from the legislative history.[2]

The government points to subsequent legislation, the Agricultural Fair Practices Act of 1968 (hereinafter referred to as the "Fair Practices Act"), 7 U.S.C. §§ 2301, *et seq.*, as reflecting a congressional design to grant Capper-Volstead immunity to broiler growers only. Portions of the legislative history, especially these excerpts from the Senate Report No. 474, 1968, U.S. Code Cong. & Adm. News, 1867-1874, do indicate that a company contracting with a grower should be considered as a "handler" of agricultural products within the meaning of the Fair Practices Act. However, these references do not demonstrate a clear intent to prevent a "handler" from also qualifying as one "engaged in the production of agricultural products" as a farmer within the meaning of the Capper-Volstead Act.

Even though the legislative background sheds little light on the problem here, guidance is sought from similar situations arising under other statutes. While numerous cases are cited by both parties, the most analogous is *N.L.R.B. v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969). In that case, the United States Fifth Circuit Court of Appeals held that the employer, a poultry farm operator contracting with independent

[2] The government quotes from various congressional reports and debates but none of these excerpts articulate exactly who is and who is not a farmer. The debates do suggest that a manufacturer which purchased a product grown by a farmer was not intended to be covered by the Capper-Volstead Act since an amendment allowing such an exemption was defeated. See 62 Cong. Rec. 2227-2228, 2275. However, this source does not reveal the intent of Congress concerning those involved in various stages of production in addition to manufacturing or who already own the products and do not purchase from a farmer.

growers to raise chickens, was engaged in farming as the term is used in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. § 203(f), and that its truck drivers who hauled chickens to market were agricultural employees within the exemption of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3). In reaching that conclusion, importance was attached to facts that the employer owned the chickens, supplied the feed and several follow-up services, retained the risk of loss throughout the entire process and assumed the hazard of market fluctuation which would affect the price of the birds.

The analysis of another case, *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966), cited in *Strain*, is also persuasive. There, the court decided that a corporation engaged in the processing and marketing of eggs was within the agricultural exemption of the Fair Labor Standards Act, 29 U.S.C. § 213, despite the company's practice of procuring eggs from independent contract growers. Essential to this resolution was the finding that the employer was a farmer. *Id.* at 258. The court examined several factors similar to those emphasized in *Strain*, and observed that the employer owned both the chicks and the eggs, supplied the feed and medicine and accepted the risk of loss of the producing stock while the growers provided the premises, labor and equipment in raising the birds. Farming was the business of the corporate employer and its president since "but for their investment and other help, the independent growers would arguably never have raised the egg-producing birds themselves." *Id.* at 260.

While *Strain* and *Tyson's Poultry* do not involve an interpretation of the antitrust exemption, they do look to the total participation of the contractor to determine if that involvement is sufficient to warrant classifying him as a "farmer" or "producer." The task, then, is to examine the facts as they relate

to the ownership of the broilers, the services furnished during the "grow-out" stage and the risks associated with the raising of broilers.

Generally, the NBMA members own the chickens and retain title to them until grown. The government cites the contracts of three members, labelled M-27, M-46 and M-47, claiming that they either have no interest in the chickens or share ownership with the growers. However, M-27 is unique because it, too, is an agricultural co-operative and its members are also the growers. Hence, they and their association would be entitled to the agricultural exemption even under the government's test. The contract of M-46 stipulates that the member and the grower shall have joint title to the poultry but it also provides that upon the contractor's repayment of the loan extended by the Production Credit Association, the chickens become the sole property of the member company. The undisputed affidavit of Ronald W. Cameron, president of M-46, states that this contract provision is used simply for financing purposes. The grower is not required to pay the contractor for the one-half interest in the birds and the risk of loss is borne by the member and not the grower. The agreement between M-47 and its growers does specify that the chicks are sold to the grower, but according to the president of M-47, this is again merely a financing arrangement. The grower pays no cash to M-47 but instead signs a note payable to the contractor who then discounts it with recourse to a local bank or the local Production Credit Association. M-47 never called on a grower to pay a note and has never paid a grower less than the amount of the note.

There is no dispute that the growers furnish the land, buildings and equipment, water, electricity and labor for raising day-old chicks to marketable size and weight. On the other hand, the NBMA members provide the chicks, feed, medicines, vac-

cines and veterinary services. In addition, the members make all decisions with respect to the number and timing of chick placements, the diets and other growing conditions and the age and size at which the broilers shall be marketed. Thus, the division of services supplied by the contractor and grower in the "grow-out" period is very similar to *Strain* and *Tyson's Poultry*.

The members of NBMA also bear substantial risks associated with actual raising of the broilers. The government urges that certain contracts suggest that the grower must pay for broiler losses. These contractual provisions, though, apply in only limited circumstances, for example, where there is loss from theft (M-10), fire resulting from the grower's negligence (M-42) or the use of unauthorized pesticides (M-50). Moreover, the affidavit of Irston R. Barnes, an economic consultant, establishes that, in practice, the members and not the growers run the chance of loss from disease or natural disaster and most make payments to the growers if the flock is lost in transport.[3]

From the standpoint of total investment, the members of the NBMA have a significant stake in producing broilers. It is clear that approximately 90% of the live bird cost is attributable to the input supplied by the members. The government's approach to this investment participation is to emphasize the large contribution of the grower for land, buildings and equipment. Because the grower accepts some uncertainty in the venture does not disprove the substantial investment risks incurred by the members. Additionally, the average costs of the building and land and equipment is only a small part of the total

[3] Many members also pay for losses due to disease and weather. See Table G-2, Affidavit of Irston R. Barnes. The fact that some do not shoulder this burden does not mean that the grower takes the loss. Apparently, the grower in these cases does not receive any compensation for his services, but since the title is in the contractor, the member foregoes not only the potential profits but also must pay for the cost of the bird.

average costs of raising a broiler. See Stipulation, Table attached to Letter of George B. Rogers dated May 9, 1975.[4]

Finally, the member must take much of the risk of the market place. Feed, which accounts for over half of the total costs, is paid for by the contractor. The government points to numerous contracts with provisions tying the grower payments to the cost of feed. However, these agreements do not permit the contractor to pass all of the feed costs and the fluctuations in price on to the grower. Generally, the terms cited merely insert into a formula the costs of feed supplied to a grower. An

[4] This table covers the period of 1972-74 and itemizes the average costs of broiler production in the South and Northeast as follows:

Costs	Average [South] (cents per pound, salable live wt.)	Average [Northeast] (cents per pound, salable live wt.)
Grower:		
Fuel	0.14	0.09
Electricity	0.07	0.10
Litter	0.10	0.03
Hired Labor	0.15	0.19
Miscellaneous	0.19	0.02
Total variable	0.65	0.43
Depreciation	0.43	0.42
Interest	0.32	0.21
Insurance	0.08	0.08
Repairs, maintenance	0.11	0.15
Taxes	0.05	0.10
Total fixed	0.99	0.96
Total grower:	1.64	1.39
Contractor:		
Feed	16.65	16.25
Chicks	2.80	2.77
Grower payment	2.30	2.63
Medication, vaccination	0.24	0.34
Fuel	0.14	0.32
Litter	0.02	0.10
Other	0.32	0.11
Total contractor	22.47	22.52

[All footnotes omitted.]

average cost for all growers is then determined and payments are varied according to deviations from the average. The more efficient grower receives greater income for his efforts.

The member, not the grower, markets the broilers. Since the ready-to-cook broiler market is influenced by weekly price fluctuations, and sometimes subject to wide variation within a year, the members face significant risks in selling their chickens. The government argues, though, tha. payments to some growers vary with the market price. While this is correct, it proves only that the growers in these circumstances also take some chance of the market place, not that the members face no such risks. Secondly, the hazards for the growers are significantly decreased by minimum payment guarantees in the contracts with the member companies.

In light of these facts, the involvement of the members of the defendant association in the production of the broilers is sufficient to justify their classification as "[p]ersons engaged in the production of agricultural products as farmers . . ." within the meaning of the Capper-Volstead Act and to permit their claim to the antitrust exemption to the extent permitted by that statute.[3]

Accordingly, the defendant's motion for partial summary judgment is granted and the plaintiff's cross-motion for partial summary judgment is denied.

So ordered this the 26 day of August, 1975.

/s/ ALBERT J. HENDERSON, JR.
Judge, United States District
Court for the Northern
District of Georgia

---

[3] Due to the result reached here, it is not necessary to decide whether the NBMA and its members are also entitled to protection of the Co-operative Marketing Act of 1926.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
NATIONAL BROILER MARKETING ASSOCIATION,
Defendant.
Civil Action. No. 18173.

ORDER

This is an action for injunctive relief brought by the United States against the National Broiler Marketing Association (hereinafter referred to as "NBMA") for alleged violation of the antitrust laws. Jurisdiction is predicated on 15 U.S.C. § 4, and the amended complaint charges that NBMA has conspired with its members to fix, stabilize and maintain the prices of broiler chickens in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. NBMA has denied the Government's substantive allegations and has further defended by asserting claim to various statutory exemptions from the antitrust laws by virtue of its status as an agricultural cooperative.

In earlier proceedings in this case, plaintiff and defendant each filed motions for partial summary judgment which focused on the issue of whether NBMA is a cooperative association of agricultural producers exempt from the antitrust laws by virtue of Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, Sec-

tion 6 of the Clayton Act, 15 U.S.C. § 17, and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455.

By Order dated August 26, 1975, this Court granted NBMA's motion for partial summary judgment, finding that the involvement of the members of the defendant Association in the production of broilers is sufficient to justify their classification as "[p]ersons engaged in the production of agricultural products as farmers . . ." within the meaning of the Capper-Volstead Act such as to permit their claim to the antitrust exemption to the extent permitted by that statute. That Order did not entirely dispose of this action because plaintiff contended that, even if defendant were an exempt cooperative, the scope of activities protected by the exemption was not as broad as the allegations of the Complaint.

On February 26, 1976, the Government amended its complaint to eliminate those allegations relating to activities which it contended were outside the scope of the exemption. The amended complaint now charges a violation of the Sherman Act by reason of activities all of which plaintiff concedes are within the protection afforded to qualified cooperatives of agricultural producers by the statutory exemptions. Plaintiff does not, of course, concede that defendant is qualified for the exemptions, and on this motion adheres to its earlier argument that defendant's members are not "producers" for purposes of the statutory exemptions because of their use of contract growers in raising broilers to marketable age.

Defendant has answered the amended complaint, and now moves for summary judgment, seeking dismissal of the action and a final judgment declaring defendant to be a duly organized cooperative of agricultural producers entitled to the various exemptions. The Government does not dispute that if NBMA is a qualified cooperative, the exemptions provide a complete defense to the allegations of the amended complaint and the action

must be dismissed. In the August 26, 1975 Order, the Court held that defendant qualifies for the exemption under the Capper-Volstead Act and Section 6 of the Clayton Act.[1] The Court adheres to that finding now. Thus, as a result of the amended pleadings, and in light of this Court's August 26, 1975 Order, the matter is now ripe for the entry of final judgment in defendant's favor.

In the stipulation entered into by the parties and filed in connection with the amended complaint on February 26, 1976, the parties agreed that the facts set forth in the "Government's Statement of Material Facts" filed June 6, 1975 and in defendant's "Statement of Material Facts Not in Dispute" filed June 20, 1975 are not disputed in these proceedings. Both of these statements incorporate references to the record sources underlying each statement of fact, and together they constitute the facts upon which the August 26 Order and the present Order are based. The Court hereby adopts these statements of the material facts, and finds that there is no genuine issue as to any of them.

On the basis of the undisputed facts, and for the reasons stated herein and in the previous Order granting defendant's motion for partial summary judgment, the Court concludes that defendant NBMA is entitled to the judgment it seeks as a matter of law.

Therefore it is Ordered, Adjudged and Decreed that

Defendant National Broiler Marketing Association is declared to be a duly organized cooperative association whose members are producers of agricultural products, entitled to act together in defendant Association pursuant to Section 1 of the Capper-

[1] That Order did not reach the question of whether NBMA and its members are also entitled to protection of the Cooperative Marketing Act of 1926.

Volstead Act, 7 U.S.C. § 291 and Section 6 of the Clayton Act, 15 U.S.C. § 17, and the activities of defendant and its members as alleged in the amended complaint are exempt from the anti-trust laws, specifically including Section 1 of the Sherman Act, by virtue of and in accordance with those statutes, and plaintiff's amended complaint is dismissed with prejudice.

Let judgment enter accordingly.

This 16 day of March, 1976.

/s/ ALBERT J. HENDERSON, JR.
ALBERT J. HENDERSON, JR., Judge,
United States District Court for the
Northern District of Georgia

APPENDIX D

United States Court of Appeals
For the Fifth Circuit

No. 76-2115

D. C. Docket No. CA18173

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

NATIONAL BROILER ASSOCIATION,
Defendant-Appellee.

Appeal from the United States District Court for the
NORTHERN DISTRICT OF GEORGIA

Before MORGAN and HILL, Circuit Judges, and NOEL,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 22, 1977

Issued as Mandate:

APPENDIX E

INTEGRATED CATTLE MARKETING

A BETTER WAY

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMER COOPERATIVE SERVICE
FCS INFORMATION 107

INTEGRATED CATTLE MARKETING

A Better Way

Clement E. Ward
Agricultural Economist

Does it concern you that only one or two prospective buyers bid on your cattle?

Does competitive pricing mean more to you than just one or two bids?

Do you wish you had access to more and better market and price information?

Do you believe your profitability could be improved if you integrated into feeder cattle growing, cattle feeding, meat packing, or marketing beef through producer-owned retail stores?

Have you found the costs of purchasing land, buildings, and equipment for integration to be prohibitively high?

If you answered yes to any of the above questions, the information here will interest you. You will learn how you and other cattlemen, through a producer owned and controlled cooperative, might: (1) integrate forward without investing in expensive land, facilities, and equipment, and yet enable you to retain your decision-making independence and flexibility; (2) attract more cattle buyers for your cattle and increase price competition; and (3) improve your access to additional market and price information.

What a Cooperative Can Do for You

A producer-owned cooperative provides the organizational structure to accomplish two objectives: (1) pool the necessary

resources to integrate into feeder cattle growing, cattle feeding, meat packing, and meat retailing; and (2) effectively market cattle and beef for its member-owners. The cooperative is controlled by its members who elect a board of directors to represent them in establishing policies and in supervising the cooperative's hired management.

What Contract Integration Offers

Contract integration allows you or your cooperative to shift to others the risks associated with investments in expensive land, facilities, and equipment required in an integrated marketing operation. You retain ownership and control of your cattle through the cooperative, but you contract with individuals or firms for certain services on a custom or fee basis. These services include growing, feeding, and even meat packing.

Other individuals or firms are willing to perform these services for you because they are specialists. They can operate on a larger scale that brings efficiencies not attainable by you or your cooperative on a smaller scale.

And you share any profits resulting from owning cattle further in the production-marketing channel.

You Have Flexibility and Options

Contract integration allows you to decide whether, when, and how far to integrate forward. With this integrated marketing opportunity, you have considerable flexibility and several options. You can choose any combination of functions to do yourself or have your cooperative contract to have others perform them.

For example, you can produce and market light feeder cattle and calves (400 to 600 pounds) through your cooperative, indicated by A in the diagram, page 4. Or you can have your cooperative contract for one, two, or all three of the next functions indicated by B, C, and D. You can have your cooperative contract for feeder cattle growing (B) and then sell your heavy feeder cattle (600 to 800 pounds) to a cattle feeder (the next marketing stage). Or you can tell your cooperative to contract further for cattle feeding (C) and market your slaughter cattle to a meat packer (the next marketing stage). Your fourth option would be to have your cooperative contract for slaughtering, buy the carcasses, and market them to a further processor (the next marketing stage).

You can bring your cooperative into play at any one or all of the contracting options—B, C, or D. Whether you decide to market light feeder cattle, heavy feeder cattle, or slaughter cattle, your cooperative markets them for you. But you decide when to market and how much integration services you want. You own the cattle throughout the integration process, until the cattle are marketed or until your cooperative purchases beef carcasses.

All beef carcasses from custom slaughtering members' cattle are purchased by the cooperative. Price is based on the carcass beef price at a predetermined time and place, plus or minus premiums and discounts for quality variations from the base price. You receive as accurately as possible what your carcasses are worth, rather than receiving the same price for all carcasses regardless of differences in quality.

Your Cooperative's Responsibilities and Options

Your cooperative coordinates all contract integration activities. It identifies and selects feeder cattle growers, cattle feeders, and meat packers who will grow, feed, and slaughter cattle, respectively, on a custom or fee basis. You appoint the cooperative as your sole and exclusive agent to negotiate custom contracts and the cooperative handles negotiations for you.

Your cooperative weighs your preferences against the preferences of custom or contract operators (growers, feeders, and meat packers). It is responsible for comparing costs among custom operators and between producers and custom operators. It ensures you are attempting to meet the needs of custom operators (for example, trying to deliver large, uniform, and healthy lots of cattle at the proper time and place), yet maintains your control of the integration process.

Your cooperative, in conjunction with your preferences and needs and those of custom operators, establishes guidelines for growing, feeding, and slaughtering cattle. That includes guidelines for you when delivering cattle and recordkeeping requirements of custom operators. It negotiates the services custom operators provide and the costs or charges for each service.

As important as negotiating the initial contract, your cooperative monitors contracts to ensure all parties are complying with contract provisions. Your cooperative monitors contracts in force and oversees the entire integration process. It then is in a

good position to evaluate contract provisions and custom operators, and to make necessary adjustments in subsequent integration activities.

In addition to responsibilities regarding contract integration through growing, feeding, and slaughtering; your cooperative has some independent integration and marketing options. The board of directors and management decide on any further processing of beef carcasses and the method of marketing beef. If your cooperative decides to further process beef, it will contract to have carcasses processed to cooperative specifications on a custom or fee basis.

Further processing expands the type of customers your cooperative can serve. It may have carcasses divided into wholesale cuts, retail cuts, fabricated into other products, or have some meats cured or smoked, among other options.

Whatever beef products are produced, your cooperative has the option of marketing beef itself or having others market it. Food brokers and (probably) meat packers would market cooperative beef on a commission basis. However, your cooperative may choose to market beef directly to consumers or to wholesale or retail distributors.

How Cattle Are Marketed

Your cooperative markets all your cattle regardless of whether you decide to integrate forward. You and your cooperative formalize the commitment to market all cattle through your cooperative by signing a marketing agreement. Marketing agreements enable your cooperative to create larger, more efficient markets that attract more buyers.

Buyer Competition Increases

Large numbers of cattle are required to operate regularly scheduled and economical markets that attract many buyers. A marketing method that can serve cattlemen in a wide geographic area, attract many buyers, yet be a relatively low-cost operation is a telephone auction.

Telephone auctions, commonly referred to as teleauctions, are conducted over a conference telephone call (several buyers listen on the same line). Teleauctions expand the market area by allowing buyers from a wide geographic area to bid on cattle without having to be present at the auction site. They are as close to the auction as their telephones. Buyers either receive a written description of cattle to be auctioned prior to the auction or an oral description over the telephone just before each lot is auctioned. They decide what price they will pay for a sale lot of cattle and bid over the telephone. Buyers save travel time and expenses, and because teleauctions can sell a large number of cattle in a shorter time than conventional auctions, buyers save buying time also.

Teleauctions expand the market area on the selling side because cattle can be auctioned from several assembly points or directly from several farms or ranches at a single auction. You may transport your cattle just as far as if they were sold at a local auction, but you market them at a larger-volume auction. If possible, your cattle are sold while they remain on farms or ranches and are transported directly to buyers after the auction. That enables buyers to purchase a large supply of cattle in a short period of time at a single auction but have them delivered over a period of time. Delivery may be spread over a 7- to 10-day period after the auction.

Because teleauctions market cattle on a description basis rather than by visual inspection, your cooperative must use a

clearly understood and consistent set of criteria to describe cattle. Teleauction marketing, with many participating buyers, can mean increased price competition compared to receiving only one or two bids for cattle. Competitive pricing and description marketing combined can more accurately transmit buyer preferences for cattle from buyers back to sellers through market prices. You more nearly receive what your cattle are worth and can more accurately determine buyer preferences for cattle.

Price Information Improves

Your cooperative can provide a valuable service for you by supplementing readily available market and price information with information generated by you and other members, custom operators (growers, feeders, and meat packers), and cattle buyers. Your cooperative assembles the data, analyzes and interprets it, and distributes results to you.

Price information, as you know, is extremely important. The U.S. Department of Agriculture, State universities, and numerous trade publications provide you with market and price outlook information. Your cooperative can supplement that by analyzing prices paid at its teleauctions. Because cattle are marketed on a description basis, you can learn the difference a given trait makes in terms of prices paid by buyers. For example, the difference between a 600-pound, choice grade, Hereford steer versus a 600-pound, choice grade, Hereford-Angus steer. Thus, you can learn the price differences for variations in weight, sex, grade, condition, breed, and other descriptive traits.

Through your cooperative's contract integration programs, you receive information on the performance of your cattle through the growing and feeding stages and the performance of cattle "on the rail." Your cooperative ensures cattle-to-owner

identity is maintained (using eartags or brands) and that performance records are kept to return performance information to you. Performance information, combined with auction results, can aid you in making intelligent production and marketing decisions.

Data you and other members provide (for example, cattle inventory, estimated increase or decrease in cattle numbers, and expected marketings throughout the year) aid your cooperative in planning the marketing and merchandising of your cattle.

Want More Information?

Detailed information on the organization and operation of this integrated marketing system can be found in "A Contract Integrated, Cooperative Cattle Marketing System," Marketing Research Report 1078. The report details a mutual marketing commitment by you and your cooperative. It explains the operation of each of your integration options (feeder cattle growing, cattle finishing, and cattle slaughtering) and the integration option of your cooperative (beef processing and marketing). The report also discusses operation of the cattle marketing program (both the teleauction exchange system and information system).

For copies of the report, write: Farmer Cooperative Service, U.S. Department of Agriculture, 500 12th Street, SW, Washington, D.C. 20250.

FCS Information 107 May 1977

Farmer Cooperative Service
U.S. Department of Agriculture

Farmer Cooperative Service provides research, management, and educational assistance to cooperatives to strengthen the economic position of farmers and other rural residents. It works directly with cooperative leaders and Federal and State agencies to improve organization, leadership, and operation of cooperatives and to give guidance to further development.

The Service (1) helps farmers and other rural residents obtain supplies and services at lower cost and to get better prices for products they sell; (2) advises rural residents on developing existing resources through cooperative action to enhance rural living; (3) helps cooperatives improve services and operating efficiency; (4) informs members, directors, employees, and the public on how cooperatives work and benefit their members and their communities; and (5) encourages international cooperative programs.

The Service publishes research and educational materials and issues *Farmer Cooperatives*. All programs and activities are conducted on a nondiscriminatory basis, without regard to race, creed, color, sex, or national origin.

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 21, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

TABLE OF CONTENTS

Volume I

	Page
Relevant Docket Entries	1
United States District Court for the Northern District of Georgia, Civil Docket	1
United States Court of Appeals for the Fifth Circuit, Filings	4
Statement of Material Facts Not in Dispute	5
Government's Statement of Material Facts	21
Errata	30
Stipulation of April 29, 1975	35
Stipulation of June 6, 1975	60
Order of August 26, 1975	81
Stipulation of February 26, 1976	91
Order of February 26, 1976	92
Amended Complaint	92
Answer to Amended Complaint	97
Order of March 16, 1976	105
Final Judgment of March 16, 1976	109
Opinion of the United States Court of Appeals, Fifth Circuit, April 22, 1977	111
Judgment of the United States Court of Appeals, Fifth Circuit, April 22, 1977	133

Volume II

Affidavit of Bob M. Anthony 135

Affidavit of Irston R. Barnes 168

Affidavit of Ford Barrett 232

Affidavit of J. Troy Copeland 238

Affidavit of Kirk H. Davis 244

Affidavit of Dr. Verner G. Hurt 250

Affidavit of Richard C. Larkin 261

Affidavit of Maurice B. Layton 274

Affidavit of Albert B. Maddox 280

Affidavit of James Archie Martin 286

Affidavit of Leroy Emerson Mayfield 292

Affidavit of H. F. McCarty, Jr. 301

Affidavit of William T. O'Neal 314

Affidavit of A. C. Smith 321

Affidavit of Thomas W. Sparks 334

Affidavit of Collier Wenderoth 342

Affidavit of Ronald M. Cameron 344

Plaintiff's Objections to the Admissibility of Affidavits Submitted by NBMA in Support of Its Motion for Partial Summary Judgment 347

VOLUME I

RELEVANT DOCKET ENTRIES

United States District Court for the Northern District of Georgia

(Title omitted in printing)

Civil Docket

Date		
1973		
Apr.	16	Complaint, filed.
May	8	Consent Order by Clk. ext. time thru 6/8/73 for deft. to answer, etc. to the complaint, filed. Copies furn.
June	8	Answer, filed.
1975		
May	1	Motion of NBMA for partial summary judgment with statement of material facts and brief, filed. (Exhibits to go with this filed in separate envelope—5/13/75) In vault.
		Affidavit of Bob M. Anthony, filed.
		Affidavit of Irston R. Barnes, filed.

Affidavit of Ford Barrett, filed.

Affidavit of J. Troy Copeland, filed.

Affidavit of Kirk H. Davis, filed.

Affidavit of Dr. Verner G. Hurt, filed.

Affidavit of Richard C. Larkin, filed.

Affidavit of Maurice B. Layton, filed.

Affidavit of Albert B. Maddox, filed.

Affidavit of James Archie Martin, filed.

Affidavit of Leroy Emerson Mayfield, filed.

Affidavit of H. F. McCarty, Jr., filed.

Affidavit of William T. O'Neal, filed.

Affidavit of A. C. Smith, filed.

Affidavit of Thomas W. Sparks, filed.

(Above affidavits sealed and in vault.)

May 2 Stipulation waiving all objections with respect to authenticity and hearsay to admission in evidence of attached documents, etc., filed.

June 10 Pltf's Cross Motion for Partial Summary Judgment, filed. Pltf's Statement of Material Facts, filed.

Pltf's Statement of Material Facts Submitted by NBMA as to Which There is a Genuine Issue to be Tried, filed. Pltf's Objections to the Admissibility of Affidavits Submitted by NBMA in Support of its Motion for Partial Summary Judgment, filed.

Pltf's Brief in Support of its Cross Motion and in Opposition NBMA's Motion for Partial Summary Judgment, filed.

Contracts of NBMA Members (submitted by pltf in support of its cross-motion for partial summary judgment), filed.

Stipulation, filed.

June 23 Deft's Response to Govt's cross-motion and opposition to deft's motion for partial summary judgment, filed. (To AJH 6/23)

Deft's Statement of Material Facts Not in Dispute, filed. (To AJH)

Deft's Reply to Govt's Statement of Material Facts. filed. (To AJH)

Affidavit of Ronald M. Cameron, filed. (To AJH)
Affidavit of Collier Wenderoth, filed. (To AJH)
Pltf's Errata re: Statement of Material Facts, filed. (To AJH)

Aug. 26 Order granting deft's motion for partial summary judgment and denying pltf's cross motion for partial summary judgment, filed. (copy to counsel)

1976

Feb. 26 Pltf's Amended Complaint, with stipulation by parties agreeing to this filing; that Govt's statement of Material Facts filed 6/6/75 and deft's statement of material facts not in dispute filed 6/20/75, are not in dispute; that pltf shall not be precluded from filing a separate action at any time and Order by AJH Allowing amended complaint, filed. (Copies furn.)

Mar. 9 Deft's Motion for Summary Judgment, with Memorandum, filed. (To AJH)

Govt's Response to Deft's Motion for Summary Judgment, filed. (To AJH)

Answer to Amended Complaint, filed. (To AJH by law clerk not orig file)

Mar. 16 Order Granting deft's motion for summary judgment and pltf's amended complaint be dismissed with prejudice, filed. c. furn.

Final Judgment filed and entered that pltf's amended complaint be dismissed with prejudice, that deft. is declared and adjudged a duly organized cooperative association—etc., that deft. recover of the pltf. its costs of action. c. furn.

Apr. 19 Notice of Appeal, filed.

United States Court of Appeals
For the Fifth Circuit

(Title omitted in printing)

Filings

Date

1976

Apr. 26 Appeal docketed.

June 1 Record on appeal, filed.

1977

Apr. 22 Opinion and Judgment of United States Court of Appeals for the Fifth Circuit, filed.

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

(Filed June 23, 1975)

References to statements by each of the parties bearing on the facts set out below are given at the conclusion of each numbered statement. The following reference code is used:

"DF-"—Statement of Material Facts Submitted by NBMA as to Which There Is a Genuine Issue to Be Tried, filed by the Government on June 6, 1975.

"GF-"—Government's Statement of Material Facts, filed by the Government on June 6, 1975.

"NBMA F-"—Statement of Material Facts filed by NBMA on May 1, 1975.

"Rogers 5/9 Letter"—Letter from George B. Rogers to Charles S. Stark dated May 9, 1975 and attached to the Stipulation filed herein dated June 6, 1975.

"M-"—Contracts of NBMA Members, individually numbered and filed under seal by the Government on June 6, 1975.

"Table G-"—Tables attached to Affidavit of Irston R. Barnes filed by NBMA on May 1, 1975.

"Admission ¶"—Plaintiffs' Response to Defendants' First Request for Admission of Facts.

"Errata"—Errata statement submitted by the Government and dated June 19, 1975, correcting errors in various items filed of record by the Government on June 6, 1975.

Cn the basis of the filings to date by the parties with respect to the material facts, the following facts are not disputed by either party:

1

NBMA was organized and chartered by the State of Georgia on September 15, 1970, as a non-profit cooperative association pursuant to the provisions of the Georgia Cooperative Marketing Act, Georgia Code Ann. § 65-201 et seq., which authorizes cooperative associations of "persons engaged in the production of agricultural products" (Georgia Code Ann. § 65-205). DF-1; NBMA F-1; GF-1.

2

NBMA was originally organized and chartered as a cooperative association with capital stock. On December 6, 1973, the Articles of Incorporation were amended to authorize cancellation of the association's capital stock and conversion of the association to a non-profit membership cooperative association not having stock. DF-2; NBMA F-2.

3

NBMA has been operated at all times for the mutual benefit of its members. DF-3; NBMA F-3.

4

No member of the association has been allowed more than one vote at any time. DF-4; NBMA F-4.

5

The association has at no time paid dividends on stock or membership capital in excess of 8 percent per annum. DF-5; NBMA F-5.

6

Unless it is determined that broilers placed by NBMA members with contract growers are the "products" of the growers and not the NBMA members, NBMA has not dealt in the products of non-members to an amount greater in value than such as have been handled by it for members. DF-6; NBMA F-6.

7

The association has been conducted at all times on a non-profit cooperative basis. DF-7; NBMA F-7.

8

NBMA serves its members through cooperative marketing and cooperative purchasing activities on behalf of its members. DF-8; NBMA F-8.

9

The RTC broiler is an agricultural product. DF-15; NBMA F-15.

10

More than 95% of all broiler chickens marketed in the United States are first marketed as processed, ready-to-cook (RTC) broilers. DF-14; NBMA F-14.

11

The production of RTC broilers involves (a) the placement, raising and breeding of breeder flocks to produce eggs to be hatched as broiler chicks, (b) the hatching of broiler eggs and placement of broiler chicks, (c) the raising of broiler chicks for a period of seven to nine weeks, (d) the catching, cooping and hauling of the grown-out broiler chickens to processing facilities, and (e) the operation of facilities to process and prepare the RTC broilers for market. DF-16; NBMA F-16.

12

Most NBMA members (or firms they own or are commonly owned with) own and operate processing plants in which broilers are slaughtered and dressed for market, feed mills, breeder flocks for the production of broiler eggs, and hatcheries in which the eggs are hatched to become day-old chicks from which broilers are raised. Six members do not own or control breeder flocks or hatcheries, but purchase chicks from outside sources. One owns a hatchery but does not own or control a breeder flock. Six members do not own or control feed mills, but purchase feed from outside sources. Four members do not own or control any broiler processing facilities; their processing is done through a contractual relationship with another company. Two members do not own or control breeder flocks, hatcheries or feed mills. GF-2; Errata, p. 1.

13

All NBMA members accomplish the growout of some or all of their broiler chickens (raising the chickens from day-old chicks to seven-to-nine-week-old chickens) through contractual arrangements with independent contractors, known as growers, whereby the contracting growers provide certain facilities and services necessary to care for the chickens. DF-19; GF-3; NBMA F-19, DF-22.

14

Of the 57 grower contracts in use by NBMA members and former members in the record on this motion pursuant to the June 6, 1975 Stipulation, 54 vest ownership of the broiler chickens solely in the members. GF 18(h); contracts of NMBA members.

15

One of the three remaining contracts (M-46) provides that the member and the grower shall have "joint ownership". GF 18(h).

16

Another of the remaining contracts (M-47) provides that the member agrees "to sell broiler chicks" and "to sell to Grower the necessary feed, vaccines, medications, and sanitation products necessary to raise said birds to processing age". The M-47 contract further provides as follows:

> "In the event of death of the birds at any time prior to the time they are picked up from the Grower's premises, Grower assumes any losses due to the expenditure of labor, use of land, facilities, equipment, and the cost of any fuel or litter. [Member] assumes the loss of the cost of the chicks, feed, and other materials supplied by [Member]."

17

The final contract is the one in use by member M-27. Member M-27 is a grower-owned cooperative, whose members include persons engaged in growing broiler chickens which are processed and marketed cooperatively through their association. The M-27 contract with its members states, in pertinent part, as follows:

> "This is an agreement between [Member], a farmers' cooperative purchasing and marketing association, and . . . . . ('Producer').
>
> "[Member] acts for its producer members in manufacturing, purchasing or otherwise obtaining for its producer-members and furnishing to them, baby chicks, feed, vaccines, medicines, and other supplies necessary for the production of broilers."

18

With respect to the growout phase of their broiler operations:

(a) All NBMA members supply the chicks, make all decisions with respect to the number and timing of chick placements,

and choose the breed or type of broiler to be produced; DF-22 (a) and (d); Errata, p. 3; NBMA F-22(a) and (d).

(b) All NBMA members supply the feed and make all decisions with regard to diet and type of feed; DF-22(b) and (j); Errata, p. 3; NBMA F-22(b) and (j).

(c) All NBMA members supply the medicines, vaccines and other health supplies. DF-22(c); NBMA F-22(c).

(d) Fieldman or supervisors employed by all NBMA members visit the growout houses (generally once a week) to assure that the grower is competently raising the birds. GF-8; DF-22(e); NBMA F-22(e); Table G-3.

(e) All NBMA members supply all veterinary services during the growout period. DF-22(g); NBMA F-22(g).

(f) All NBMA members transport the chickens and feed to the growers, and transport the grown-out chickens from the growers to the processing plant. DF-22(h); NBMA F-22(h).

(g) All NBMA members provide the equipment and all provide some, most provide all, of the labor, for catching, cooping and loading the live birds. DF-22(i); NBMA F-22(i); Table G-3.

(h) All NBMA members make all decisions with regard to the age and size at which birds shall be marketed. DF-22(k); NBMA F-22(k).

19

The only phase of broiler production requiring any investment by the contract broiler grower is the broiler growout phase. DF-25; NBMA F-25.

20

The contract grower's risk of investment in broiler production is limited to the value of his investment in the facilities (land, buildings and equipment), services and utilities (heating fuel and

electricity) and in some cases other supplies such as litter, used in the growout phase. DF-26; NBMA F-26.

21

The grower's risk of loss of his buildings and equipment is insurable. DF-27; NBMA F-27.

22

The only farm land owned by individual growers which is devoted to the raising of broilers is the land underlying the broiler houses and the area required for a roadway to the houses. DF-28; NBMA F-28.

23

The land requirement for housing and raising a typical broiler flock (10,000 to 45,000 birds) is less than 5 acres. DF-29; NBMA F-29.

24

A recent survey indicates that during the period 1972-74 an average broiler grower in the South incurred costs of 1.64 cents per salable liveweight pound in connection with the raising of a flock of broilers under contract. The same survey indicates that an average broiler contractor, or integrator, incurred costs of 22.47 cents per salable liveweight pound in production of the same broiler. GF-14; Table titled "Broiler Production Costs and Efficiency, Southern and Northeastern Regions, 1972-1974," attached to Rogers 5/9 Letter (hereinafter referred to as "Rogers Table").

25

The 1.64 cent average grower cost in the survey includes both fixed and variable costs incurred by the growers. The 22.47 cents average contractor cost includes only the costs associated with feed, chicks, grower payment, medication, vac-

cination, fuel, litter, administration, field supervision, insurance, and miscellaneous. No processing costs or costs associated with depreciation on capital investment, interest, repairs and maintenance, taxes or other fixed cost expenses are included in the total contractor cost average. Rogers Table and Table footnote 5.

26

The survey indicating a 1.64 cent per salable live weight pound average grower cost also indicated a 2.30 cent per salable live weight pound average grower payment.

While broiler growers in the south included in the survey were thus averaging a 40% return during the 1972-74 period, annual net returns to broiler integrators (nationwide) averaged as follows, according to estimates by the USDA Economic Research Service:

Years	Returns (based on lagged feed prices)	Returns (based on contemporaneous feed prices)
1972	-0.1 $/lb.	-0.8 $/lb.
1973	2.6 $/lb.	1.6 $/lb.
1974	-2.0 $/lb.	-2.3 $/lb.

Rogers Table; Rogers 5/9 Letter and two annual net returns tables attached thereto.

27

An integrated broiler firm that processes and markets 40 million birds per year, a "medium" size firm, may have facilities for raising breeder flocks, a hatchery and processing facilities having a present replacement value of some what less than $8 million. Growers associated by contract with the firm may have an aggregate investment in broiler houses and equipment in which the 40 million broilers a year are raised of approximately 9.2 million, with a present replacement value of the same buildings and equipment as much as 50% greater. GF-5.

28

Applying the average figures for broiler production in the South, 1972-74 (Rogers Table), the integrated broiler firm's annual investment in variable production costs with respect to the 40 million birds referred to in the next preceding paragraph would amount to approximately $34 million (22.47 x 3.77 [average live weight pounds per bird] x 40 million = $33,884,760). The annual aggregate investment of all growers associated with the firm in the production of 40 million birds would amount to approximately $2.5 million (1.64 x 3.77 x 40 million = $2,473,120). GF-5; Rogers Table.

29

The *absolute* amount of fixed costs incurred by contractors exceeds grower fixed costs. Rogers 5/9 Letter.

30

During the period 1972-1974, mortality during the grow-out phase of broiler production among southern broiler flocks surveyed averaged 3.26%. Rogers Table.

31

Approximately 90% of the live bird cost of producing broilers is accounted for by inputs supplied by the broiler integrator including feed, chicks, medications, veterinary supplies and services, grow-out supervision, transportation and labor for catching, cooping and hauling. DF-31; NBMA F-31.

32

More than half of the live bird cost is accounted for by feed costs alone. DF-32; NBMA F-32.

33

The broiler integrator, rather than the contract grower, is the purchaser of feed or feed ingredients on the open market. DF-33; NBMA F-33.

34

The broiler integrator is the seller of broilers on the open market and bears a risk of fluctuations in prices for RTC broilers due to market conditions. DF-34; NBMA F-34.

35

The broiler integrator, who sells broilers on the open market, has no guarantee of any return and therefore risks all of his investment in the production and marketing of broilers. DF-35; NBMA F-35.

36

The development of commercial broiler production came about at the initiative of integrators, who began as growers, hatcherymen, feed dealers, feed manufacturers or broiler processors and over time undertook risks of investment in feed, chicks and supplies and risks of marketing the product. For purposes of this motion, NBMA does not contest the Government's assertion that NBMA members have not assumed all of the risk of investment in feed, chicks and supplies or all of the market risk in the sale of broilers. DF-38; NBMA F-38.

37

The broiler market in which the integrators sells has all the characteristics of the typical agricultural market. The product is perishable and is produced through a biological process; once production is committed, the integrator must either sell his product or destroy it; pricing is characterized by volatility and instability, a characteristic which is harmful to producers; and the product is distributed through middlemen intervening between the integrator and the consumer. DF-45; NBMA F-45.

38

The market conditions under which RTC broilers are produced and marketed are typical of conditions in agricultural

markets generally, and in some cases even more difficult for producers to cope with than conditions with respect to other commodities. Broilers are a perishable commodity, and must be marketed regardless of demand; the sellers are scattered and uninformed with respect to inventories and demand, and the market is consequently highly susceptible to overproduction; the demand is seasonal and cyclical; the market price fluctuates weekly; and the market is dominated by concentrated buyers. DF-46; NBMA F-46.

39

Historical patterns and trends in demand for broilers are frequently modified by unanticipated and unforeseeable occurrences, such as retail price specials, fluctuations in supplies and retail prices for beef and pork, weather conditions, labor strikes, and variations in broiler production levels. DF-48; NBMA F-48.

40

Production decisions for integrators who own or control breeder flocks begin as much as 18 months before the product of those decisions reaches the market, with the decisions relative to placement of breeder chicks. DF-49; NBMA F-49.

41

Production adjustments after breeder chicks are placed require either (i) removing some breeder hens from production (for those integrators who own or control breeder flocks); (ii) diverting breeder chick eggs from production prior to hatching (for those integrators who own or control breeder flocks); or (iii) destroying the broiler chicks after hatching but prior to placement for the grow-out (for those integrators who own or control hatcheries). DF-50; NBMA F-50.

42

A decision to cut back production using any of the methods described in the preceding paragraph requires the sacrifice of

the integrator's investment in connection with the laying flock and the hatchery up to the point of decision and removal from production. DF-51; NBMA F-51.

43

The final opportunity for adjustments in the broiler integrator's production—the time when broiler chicks are placed for the grow-out—comes approximately 8 weeks prior to the day on which the broilers will be ready for slaughter and must be marketed. DF-52; NBMA F-52.

44

Fresh broilers are highly perishable. DF-53; NBMA F-53.

45

In commercial practice, chilled (non-frozen broilers) must be sold to the ultimate consumer within 7 to 10 days of slaughter. Because of this limited shelf life, broiler integrators must sell all their fresh product within a maximum of 4 days from time of slaughter. DF-54; NBMA F-54.

46

More than 90% of all federally inspected RTC broilers are sold in fresh (non-frozen) form. DF-55; NBMA F-55.

47

Broilers are produced through a biological process, and once production is committed by the integrator, he must either sell his product or destroy it. DF-56; NBMA F-56.

48

The demand for broilers is for birds in a fairly narrow weight range from approximately 2 to approximately 3½ pounds dressed weight. DF-57; NBMA F-57.

49

Broiler chickens which are not slaughtered when they reach market weight continue to increase in weight beyond desirable levels. Birds exceeding the desirable weight must normally be sold at a discount below prevailing price levels for desirable weight birds. DF-58; NBMA F-58.

50

Broiler chickens which are not slaughtered when they reach desirable market weight remain in the field consuming feed and increasing production costs incurred by the integrator. DF-59; NBMA F-59.

51

Consumer demand for broilers fluctuates from week to week, with peaks and valleys in demand occurring in connection with, among other things, holidays and seasons of the year. DF-60; NBMA F-60.

52

Broilers are produced continuously, however, with little leeway in the timing of their slaughter. When supplies build up, the broiler integrator must find retail buyers, because no important alternative outlet is available for the diversion of surplus supplies. DF-61; NBMA F-61.

53

Most broiler integrators are dependent on certain retailers purchasing their product every week. Because of the perishability of the product, the broiler integrator must sell his product quickly, if not to his regular account, then to a hurriedly found substitute. DF-62; NBMA F-62.

54

A retailer's use of promotional price specials causes fluctuations in his customers' demand for broilers; thus, the retailer has much greater latitude in determining how much chicken to buy than the seller has in determining how much to produce for sale. DF-63; NBMA F-63.

55

Retail merchandising policies and practices strongly influence short-run demand faced by individual broiler integrators. Retail specialing, for example, creates large product demands during special weeks but greatly reduced demands during non-special weeks. DF-64; NBMA F-64.

56

For broiler integrators regularly dependent upon selling large volumes to certain customers, fluctuating retail requirements can cause them to be burdened periodically with heavy inventories. DF-65; NBMA F-65.

57

When unsold supplies pile up, sellers find themselves in rapidly deteriorating bargaining positions, forcing them to sell at prices below current market levels. DF-66; NBMA F-66.

58

Integrators often market their product at prices insufficient to return to them their cost of producing the broilers, and the broiler market during several recent years has been characterized by violent swings within the year. DF-67; NBMA F-67.

59

During the 39 months covered by the Complaint (January, 1970 through March, 1973), USDA Economic Research Service analysis of net returns to broiler integrators on an aggregate basis indicated losses for 21 of those months, with a positive net return in only 18 of those months. DF-68; NBMA F-68.

60

On an aggregate basis, monthly net losses during the period were as high as 5.44 cents a pound, averaging 1.69 cents per pound. The highest net positive return for the period was 4.77 cents per pound, with an average of 1.02 cents per pounds for all months showing positive returns. DF-69; NBMA F-69.

61

Violent swings in day-to-day or week-to-week purchases create substantial problems for producers of agricultural products, and create particular problems for the broiler industry. The product is perishable; it has to be moved in a relatively short period of time and cannot be stored and held; and the production process for broilers is such that the flow of product cannot be varied substantially from day to day once the decision has been made to produce at a certain rate over time. DF-70; NBMA F-70.

62

Integrated broiler production has developed in areas of limited alternative agricultural enterprise, and has replaced or supplemented incomes received by rural families from other sources. DF-73; NBMA F-74.

63

NBMA's members and other integrated producers have investments in land, buildings and equipment for hatcheries, feed mills or processing plants, or some combination of those functions. DF-23; NBMA F-23.

64

In the production and marketing of their broilers, NBMA members and other integrated broiler producers have an investment in some if not all, of the following: Hatchery, hatchery supply (breeder) flock, feed or feed ingredients and feed mill, growout supplies, chicks, processing facilities and the labor necessary to process the RTC broiler for market. DF-24; NBMA F-24.

Dated: June 20, 1975.

Respectfully submitted,

/s/ SIDNEY O. SMITH, JR.
/s/ MICHAEL A. DOYLE
/s/ FREDERICK H. VON UNWERTH
/s/ PETER KONTIO

Of Counsel:

ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303
(404) 588-0300

Of Counsel:

MILTON H. MITCHELL
CARTER, MITCHELL & ROBINSON
P. O. Box 2216
Jackson, Mississippi 39201

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

GOVERNMENT'S STATEMENT OF MATERIAL FACTS

(Dated June 6, 1975)

The following Statement of Material Facts is submitted in support of the Government's Cross-Motion for Partial Summary Judgment. The facts set forth in this Statement are based largely on materials obtained from the defendant, and we believe they are not in dispute. The sources in the record that support each fact are cited herein as follows:

Affidavits filed by NBMA in support of its motion are referred to by the last name of the affiant and the paragraph in the affidavit to which references is made.

"NBMA F-[numeral]" refers to a statement contained in NBMA's Statement of Material Facts. The numeral indicates the numbered statement to which reference is made.

"June 6, 1975 Stipulation" refers to a Stipulation of that date filed by counsel to the parties.

"Rogers 5/9 letter", "Rogers 5/23 letter" and "GX-1" refer respectively to the letters of May 9, 1975 and May 23, 1975 from Dr. George B. Rogers of the Economic Research Service of the U.S. Department of Agriculture to Charles S. Stark, and GX-1 refers to a table of information concerning NBMA members, all of which are attached to and made part of the record in accordance with the June 6, 1975 Stipulation.

"M-[numeral]" refers to an NBMA member's grower contract. The contracts have been filed with the court under seal, pursuant to the Protective Order of December 27, 1973, and are made part of the record in accordance with the June 6, 1975 Stipulation. Facts that are true of members' contracts generally are referenced to "Contracts generally."

"Table G-[numeral]" refers to one of the tables attached to and made part of the affidavit of Irston R. Barnes, submitted by NBMA in support of its Motion.

1. The National Broiler Marketing Association (NBMA) is an organization of firms engaged in the marketing of broiler chickens. The Association was chartered on September 15, 1970, and began operation later that year. Seventy-eight firms are, or have at some time since the organization of the association, been members of NBMA. (NBMA's Statement of Materials Facts, ¶ 1; Defendant's Ans. to Plaintiff's Second Interrogatories, Ans. to Int. 6).

2. Most NBMA members (or firms they own or are commonly owned with) own and operate processing plants in which broilers are slaughtered and dressed for market, feed mills, breeder flocks for the production of broiler eggs and hatcheries in which the eggs are hatched to become day-old chicks from which broilers are raised. However,

(a) At least 6 members do not own or control breeder flocks or hatcheries; they purchase chicks from outside sources. One additional member does not own or control breeder flocks, but does have a hatchery.

(b) At least 6 members do not own or control feed mills; they purchase feed from outside sources.

(c) At least 4 members do not own or control any broiler processing facilities; their processing is done through a contractual relationship with another company.

(d) Two members do not own or control breeder flocks, hatcheries or feed mills. (Table G-1; June 6, 1975 Stipulation, ¶ 3)

3. In most cases, the broilers that are marketed by NBMA's members are raised by independent growers on their own land, in their own buildings and equipment and with labor they perform or furnish, under contractual arrangements with the member firms. At least 32 members do not own or operate any farms on which broilers are raised, including two members who do not own or control any breeder flocks, hatcheries or feed mills, either. Of the remaining members for which information is available, all but three rely on independent contract growers for the production of at least eighty percent, and usually more, of the broilers they market. One member relies on contract growers for 47.3% of the broilers its markets, and two members raise all of the broilers they market on their own farms. (Table G-1; GX-1)

4. Broiler growers, with whom NBMA's members contract for the production of broilers, are independent farmers who have substantial investments in land, buildings and equipment devoted to the production of broilers. A recently conducted survey indicates that a broiler grower in the South who produces 30,000 broilers per flock (or 135,000 broilers a year, since an average grower raises 4½ flocks a year), a typical figure, has an average investment in broiler houses and equipment of approximately $31,200, which does not include the value of the land under and around the broiler houses. This figure is an average of the costs of buildings and equipment of various ages, and the present replacement value of the same buildings and equipment is as much as 50% greater. (NBMA F-19; Rogers 5/23 letter; McCarty ¶ 39; Sparks ¶ 16; Smith ¶ 34)

5. A broiler firm that processes and markets 40 million birds per year, a "medium" sized firm, may have facilities for raising breeder flocks, a hatchery and processing facilities having a present replacement value of less than $8 million. By contrast, the aggregate investment of growers in broiler houses and equipment needed to raise 40 million broilers a year is approximately $9.2 million, and the present replacement value of the same

buildings and equipment is as much as 50% greater. (Hatfield Dep. p. 12 lines 18-25, p. 14 line 15, p. 15 line 10, p. 15 lines 21-22, p. 16 line 1, p. 18 line 3, p. 42 line 1, p. 44 line 23; Paragraph 5, *supra*)

6. The contracts entered into between NBMA's members and broiler growers usually provide that:

(a) The grower furnishes his land, buildings and equipment, water, electricity and all labor needed to raise the broilers from day-old chicks to birds of marketable size and weight;

(b) The member furnishes the chicks and the feed and health supplies to be used in raising the birds. (Barrett ¶ 28; Copeland ¶ 25; Davis ¶ 30; Layton ¶ 31; Maddox ¶ 24; Martin ¶ 32; Mayfield ¶ 40; O'Neal ¶ 36; Sparks ¶ 37; McCarty ¶ 29; Contracts generally)

7. Contracts of 9 members require the grower to be present and assist in the catching and loading of the grown-out birds. (M-9, 11, 19, 32, 47, 49, 51, 58, 64)

8. In most contract growing arrangements, a serviceman employed by the member firm visits the grower's farm roughly once a week to assure that the grower is competently raising the birds. The day-to-day management of the flock is handled by the grower. (Smith ¶ 43; M-39; M-41; Contracts generally)

9. Contracts used by at least 29 of NBMA's members expressly provide that the grower is an independent contractor, or state that the grower is in no way an agent, employee or partner of the member firm. One present member's contract provides that:

> [I]t is expressly understood and agreed that Grower in the performance of his duties is not subject to the control or supervision of [member] but as an independent contractor responsible only for the results of his services and covenants contained herein. (M-41)

Another member's contract provides that:

> [T]he producer [grower] shall perform this contract as an independent contractor free of control by owner [member] as to the details of the work to be done and accomplished by the producer . . . [N]or shall the fact of . . . services being offered to the producer [by the member] be construed to be or indicate a right on the part of the owner to control the details of the manner in which producer performs the work to be done or accomplished under this agreement. (M-39)

(M-6, 7, 9, 10, 12, 14, 22, 23, 26, 31, 35, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 56, 57, 58, 60, 61, 63)

10. Usually the contracts provide for a minimum and a maximum payment per pound or per bird. Contracts used by 51 members do not guarantee any payment to the grower for birds that die because of disease or weather before they reach marketable age. Many members say that in practice they do not pay growers for birds that die as a result of such causes. (GX-1; Table G-2; Table G-4)

11. Contracts used by NBMA members include the following provisions for determining the amounts paid to the grower, between the specified minimum and maximum payments for live broilers:

(a) Under the contracts used by 23 members, the amount received by the grower depends on the market price of broilers. (Table G-4; Contracts of members having "market clause");

(b) Under the contracts used by 50 members, the amount received by the grower for raising a flock of broilers depends on the amount of feed furnished by the member in connection with that flock, so that the more feed the birds consume per pound of live weight, the less the grower receives (Table G-4; Contracts of members having "efficiency differential");

(c) Under the contracts used by 25 members, the payment received by the grower depends upon the cost per bird of per pound of the chicks and other supplies or services furnished by the member, as well as feed, so that the greater the cost per bird or per pound of the inputs furnished by the member the less the grower receives (M-6, 9, 12, 19, 21, 23, 27, 29, 31, 34, 35, 37, 39, 42, 46, 49, 50, 51, 53, 57, 58, 59, 61, 62);

(d) Under the contracts used by 7 members, having payment provisions of the type described in subparagraph 10(c) above, the payment to the grower is diminished or increased cent-for-cent by the amount the cost of member-supplied inputs is more or less than the average cost of inputs furnished to other growers (M-6, 23, 29, 31, 47, 50, 58);

(e) Under the contracts used by 2 members, the amount received by the grower depends on the current price of feed or feed ingredients, so that as the price of feed or feed ingredients goes up the grower gets less (M-9, 53);

(f) One member's contract provides that feed will be billed to the grower at a profit margin to the contractor. (M-17)

12. Responsibility for payment for heating fuel used in growing broilers normally rests with the grower. Of 54 present and former members for which information is available, 15 reimburse the grower for all or part of his fuel costs. Barnes ¶ 30; Table G-3)

13. Litter used in the growing of broilers is normally paid for by the grower. Of 54 present and former members for which information is available, 36 do not supply or pay for litter, 15 do supply or pay for litter and two members supply litter to one group of growers but do not supply litter to two other groups of growers with whom it contracts. (Barnes ¶ 31; Table G-3)

14. A recent survey indicates that during the period 1972-74 an average broiler grower in the South incurred costs of 1.64¢ per pound in raising a flock of broilers. At least 21 members guarantee broiler growers less than 1.64¢ per pound. A grower contracting with any of those members has no assurance that he will recover enough on a flock of broilers to pay the expenses he incurs in raising the flock, let alone any return for his labor, even if the entire flock survives to marketable size and weight. (Table G-4)

15. NBMA members are free to lower the payment scale (or other terms) in their contracts with growers before a flock is started, in response to rising feed costs or falling market prices for broilers. Two members' contracts expressly provide that "[Members] reserves the right to change pay schedule if economic conditions so warrant." (M-5, M-13) The record in this case includes two instances during the recent period in which members have reduced payments to growers for one or more flocks in response to these conditions, in one instance by 45%. (McCarty ¶ 15; M-38; M-53)

16. Contracts used by NBMA members usually do not obligate the member to place with the grower any specified number of flocks per year, or any specified number of chicks per flock. Members are thus free to vary the number of flocks or chicks placed with growers, or the length of time between flocks, in accordance with their projected marketing requirements. Accordingly, growers have no assurance of continuous revenues from the raising of broilers. (Table G-8; Barnes ¶ 50: Contracts generally)

17. Contracts used by NBMA members usually may be terminated by the member (upon notice) after any flock. NBMA members can and do terminate their dealings with individual broiler growers for a variety of reasons, including the grower's purported inefficiency, the member's dissatisfaction with the grower's facilities, the member's decision to cut back on the number of growers with whom it will deal, or the member's determination that the grower is located too far from the mem-

ber's facilities. While in some cases a grower who is cut off may be able to contract with another firm, in other instances there is no other broiler contractor in the area competing for growers. Thus, the grower has no assurance of continued revenues to support his investment in broiler raising facilities. (Contracts generally; GX-1; Table G-7)

18. Among NBMA's present and former member are firms whose contractual arrangements with broiler growers include the following provisions:

(a) A requirement that the grower pay all taxes on the birds, feed, grit, litter, fuel and sanitation products (M-23);

(b) A provision requiring the grower to pay for all chick losses in excess of 5% (M-11);

(c) A provision under which the grower is obligated to pay damages to the member in the event birds die as a result of fire caused by the grower's negligence (M-42);

(d) A provision that in the event of fire or natural disaster, any feed losses are to be split between the grower and the member (M-57);

(e) A provision that the grower will bear the risk of loss from theft, his own or his agent's negligence, or from his failure to practice sound poultry management (M-10);

(f) A provision that the grower will pay for the catching and loading of the birds, subject to partial or full reimbursement if the member makes a profit on the sale of the birds (M-17);

(g) A provision requiring the grower either to assist in catching and loading the birds or to pay the member for the service (M-51);

(h) Provisions giving the grower title to the birds (M-27, 47), or sharing title between the member and the grower (M-46);

(i) A provision that the grower will bear any losses resulting from the use of pesticides (M-50);

(j) A provision under which the grower is to hold the member harmless from and indemnify him "against any and all claims, suits, demands or actions arising in any manner from the operation of [the grower's] premises," other than those arising from the member's acts (M-52);

(k) Provisions under which the member sells the chicks to the grower (M-46, M-47);

(l) A provision establishing ownership of feed and supplies, as well as chicks, in the grower. (M-27)

19. Other provisions of members' contracts are indicative of the parties' roles. For example, the contract used by one member, itself a cooperative, states:

> [Member] acts for its producer members in manufacturing, purchasing or otherwise obtaining for its producer members, and furnishing to them, baby chicks, feed vaccines, medicines, and other supplies necessary for the production of broilers. [Member] also acts for its producer member in furnishing management advice in the production of broilers for market, and further acts for such producer members in the processing and marketing of broilers and other agricultural commodities produced by such members. Producer is engaged in the business of raising broilers for market. (M-27)

Another member's contract begins,

> [Member], in order to enable the grower to engage in the production of broilers, hereby delivers to Grower one certain lot of [chicks]. It is distinctly understood and agreed that said chicks shall at all times remain the property of [member] until such time that the grower can repay [member] or other lending institution for any loan ad-

vanced for the particular purpose of growing this lot of chicks from the age of day-old to a stage which will qualify them, to be sold as broilers-fryers. (M-36)

Another member's contract begins,

[W]hereas, Dealer [member] deals in poultry and supplies and is the owner of the broiler chicks hereinafter mentioned, which are sometimes also referred to as 'chicks' and as 'broilers', and whereas, grower is engaged, among other things, in raising poultry. . . . (M-7)

Respectfully submitted this 6th day of June, 1975.

/s/ CHARLES S. STARK
/s/ LARRY R. PATTON
/s/ ELLIOT R. WARREN
Attorneys, Department of Justice
Washington, D.C.

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Title omitted in printing)

ERRATA

(Dated June 19, 1975)

Plaintiff hereby amends its Statement of Material Facts, Statement of Material Facts Submitted by NMBA as to Which There is a Genuine Issue to be Tried, Brief in Support of its Cross Motion and in Opposition to NMBA's Motion for Partial Summary Judgment, and the Stipulation filed June 6. 1975, to incorporate the following corrections:

Government's Statement of Material Facts

At p. 1, second line from the bottom, "letter" should read "letters".

At p. 2, fifth line from the bottom, "market;" should read "market,".

At p. 3, the first subparagraph at the top of the page should read:

"(a) At least 6 members do not own or control breeder flocks or hatcheries; they purchase chicks from outside sources. One additional member does not own or control breeder flocks, but does have a hatchery."

At p. 3, numbered paragraph 3 should read, from the beginning of the third sentence in the paragraph, as follows:

"Of the remaining members for which information is available, all but three rely on independent contract growers for the production of at least eighty percent, and usually more, of the broilers they market. One member relies on contract growers for 47.3% of the broilers it markets, and two members raise all of the broilers they market on their own farms. (Table G-1; GX-1)"

At p. 5, numbered paragraph 9, "(M-41)" should be appended to the first quoted excerpt and "(M-39)" should be appended to the second quoted excerpt.

At p. 6, numbered paragraph 10, first line, "contractors" should be "contracts". The sources cited at the end of the paragraph should be "(GX-1; Table G-4)".

At p. 6, numbered paragraph 10, the following sentence should be added: "Many members say that in practice they do not pay growers for birds that die as a result of such causes. (GX-1; Table G-2)."

At p. 6, numbered paragraph 11, subparagraph (b), at the first line of the subparagraph, "48" should be "50".

At p. 6, numbered paragraph 11, subparagraph (c), the references to members' contracts should be "(M-6, 9, 12, 19, 21, 23, 27, 29, 31, 34, 35, 37, 39, 42, 46, 49, 50, 51, 53, 57, 58, 59, 61, 62)" (deleting M-17, 22 and adding M-12, 19, 21).

At p. 7, numbered paragraph 12, line 3, "13" should be "15". The sources cited at the end of the paragraph should be "Barnes ¶30; Table G-3)".

At p. 7, numbered paragraph 13, the second sentence should be as follows: "Of 54 present and former members for which information is available, 36 do not supply or pay for litter, 15 do supply or pay for litter and two members supply litter to one group of growers but do not supply litter to other groups of growers with whom they contract. (Barnes ¶31; Table G-3)"

At p. 8, line 1, "22" should be "21".

At p. 8, numbered paragraph 16, line 3, "chicks" should be "flocks".

At p. 9, numbered paragraph 18, subparagraph (b), line 2, "(M-12)" should be "(M-11)".

At p. 10, numbered paragraph 18, subparagraph (k), line 2, "(M-7, M-14, M-47)" should be "(M-46, M-47)".

Statement of Material Facts Submitted by NBMA as to Which There Is a Genuine Issue to Be Tried

At p. 2, paragraph 1, line 1, "[numeral]" should be "[numeral]" ".

At p. 2, paragraph 2, line 1, "June 6, 1975 Stipulation" should be " "June 6, 1975 Stipulation" ".

At p. 2, paragraph 4, line 1, "[numeral]" should be "[numeral]" ".

At p. 4, numbered paragraph 18, last line, "Objections to Admissibility" should be "*Objections to Admissibility*".

At p. 6, numbered paragraph 22, subparagraph (a), line four, "three" should be "two".

At p. 6, numbered paragraph 22, subparagraph (b), the second sentence should be deleted and the following sentence substituted in its place: "The contract of one member establishes ownership of the feed in the grower."

At p. 7, numbered paragraph 22, subparagraph (e) and (f), last line, "set forth" should be "referred to".

At p. 8, numbered paragraph 23, paragraph two, line four, "a single exception" should be "three exceptions".

At p. 9, numbered paragraph 30, line 2, "the payment" should be "a payment".

At p. 10, numbered paragraph 34, line 5, "members receive" should be "members, receive".

Government's Brief in Support of Its Cross Motion and in Opposition to NBMA's Motion for Partial Summary Judgment

At p. 2, first full paragraph, last line, "(GF-1)" should be "(GF-2)".

At p. 3, line 5, "pro duction" should be "production".

At p. 4, line 6, "(GF-9, 13)" should be "(GF-10, 14)".

At p. 4, first full paragraph, line 14, "(e)" should be "(5)".

At p. 5, second line from the bottom of the page, "Mateial" should be "Material".

At pp. 7 and 14, in the quotations of 7 U.S.C. §291, (a) there should be no space between the eighth and ninth lines of the quotation (p. 7 only); (b) at the beginning of the first proviso, "First:" should be "First."

At p. 25, second full paragraph, line 3, "Broiler Industry" should be "*Broiler Industry*, a trade periodical,".

At p. 26, third line from the bottom of the page, "producer a bailment contract" should be "producer under a bailment contract".

At p. 27, fifth line from the bottom of the page, "pesons" should be "persons".

At p. 37, second line of the footnote, "contractors" should be "contractor's".

At p. 43, third full paragraph, line 9, "Lasbor" should be "Labor".

June 6, 1975 Stipulation

The following corrections and additions to materials placed in the record in accordance with the June 6, 1975 Stipulation are made with the consent of counsel for defendant NBMA.

1. Exhibit GX-1, which is attached to the Stipulation, should be amended as follows:

(a) For Member 26, the entry in the column headed "Percentage of Broilers Raised by Contract Growers" should be "47.3%" rather than "0%", and the entry in the column headed "Live Birds Acquired From Sources Other than Contract Growers" should be "0" rather than "NR".

(b) For Member 28, the entries in each column other than the last (Live Birds Acquired From Sources Other Than Contract Growers) should be "NA" rather than "NR".

2. The "Contracts of NBMA Members," filed pursuant to the Stipulation, should include the following documents, which are submitted herewith to be filed under seal, pursuant to the Court's Protective Order of December 27, 1973:

(a) Contract of Member M-21.

(b) Amendment to contract of Member M-53.

Respectfully submitted this 19th day of June, 1975.

/s/ CHARLES S. STARK
Attorney, Department of Justice
Washington, D. C. 20530

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

STIPULATION

(Dated April 29, 1975)

The parties hereto acting by and through their attorneys of record hereby stipulate as follows:

The parties hereby waive all objections with respect to authenticity and hearsay to the admission in evidence of the following documents or portions of documents, copies of which are attached hereto, in connection with the Court's consideration of any motion for summary judgment or trial in this action; except that the parties make no stipulation as to the truth, accuracy or relevance of any statement or any statistics contained therein:

(a) Page 3 of *Broiler Marketing Facts, Third Quarter 1975*, United States Department of Agriculture, Agricultural Marketing Service, March, 1975.

(b) Tables appearing on pages 5 and 8 of *The Chicken Broiler Industry: Structure, Practices and Costs*, USDA Economic Research Service, Marketing Research Report No. 930 (1971).

(c) Cost of Living Council Release No. 189, January 4, 1973.

(d) January 24, 1974 letter from George B. Rogers to Mr. Richard Arnold, Office of Economic Policy, Antitrust Division, Department of Justice, with attachments thereto, through the fourth full paragraph on the second page of the letter but not including succeeding paragraphs.

(e) October 21, 1974 letter from Verel W. Benson to Richard Arnold, Office of Economic Policy, Antitrust Division, Department of Justice, with attachment thereto.

(f) Table 2, appearing on p. 28 of *Poultry and Egg Situation*, March 1975, Economic Research Service, United States Department of Agriculture (PES-285).

(g) Table 7.8 appearing in *Egg and Poultry Statistics through 1957*, Statistical Bulletin No. 249, USDA Agricultural Marketing Service (May 1959).

(h) Table 16 appearing in *Egg and Poultry Statistics through 1972*, Statistical Bulletin No. 525, USDA Economic Research Service (February 1974).

(i) Table appearing on p. 10 of *Chickens, Eggs and Broilers: Production, Disposition, Cash Receipts and Gross Income*, 1972-1973 by States, Statistical Reporting Service, USDA Pou 2-3(74), April, 1974.

(j) Table appearing on p. 2, *Poultry Slaughter*, Statistical Reporting Service, USDA Pou 2-1(1-75).

So stipulated, this 29th day of April, 1975.

/s/ CHARLES S. STARK
Attorney, Department of Justice
Attorney for Plaintiff

/s/ FREDERICK H. VON UNWERTH
Attorney for Defendant National
Broiler Marketing Association

(c)

marketing facts

THIRD QUARTER 1975

U S DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
WASHINGTON, D C 20250

Summary

Broiler chick placements for marketing in the first quarter of 1975 were reduced about 8 percent from year-earlier levels because of the poor profit picture. Chick placements and eggs set for marketings in the second quarter of 1975 indicate broiler production will continue below a year ago.

Broilers will face less competition from pork and turkey in the third quarter of 1975 than a year earlier, but more competition from larger supplies of lower grade beef.

Based on historical relationships, broiler production in the third quarter of 1975 at the same per capita level as in 1974 would result in an average price of about 40 cents per pound, approximately 2 cents above 1974. Population is expected to be almost 1 percent above a year earlier.

Feed costs, which account for more than two-thirds of the expense of producing ready-to-cook broilers, may be a little lower in the third quarter of 1975 than the year before based on prospective feed crop plantings and average growing conditions. Corn prices may be about the same as a year earlier, but lower soybean meal prices are expected. Other production, processing, and marketing costs are expected to be higher in the third quarter of 1975.

Current Situation

Broiler production in the first quarter of 1975 may be down about 8 percent from last year's level. Corn prices are running near year-earlier levels, but soybean meal is around $20 per ton lower. Prices paid by farmers for broiler grower feed in mid-January 1975 averaged $176 a ton, $6 above a year ago. The broiler-feed price ratio (pounds of feed equal in value to a pound of liveweight broiler) in January 1975 was 2.8 compared to 2.5 a year earlier. The improvement was the result of the higher value of broilers.

Broiler prices (9-city delivered weighted average) averaged 41.5 cents per pound in January-February 1975, up 1.9 cents from last year. Smaller supplies of pork and turkey are lending strength to broiler prices, but a larger supply of beef and lower real disposable consumer income continue to exert downward pressure.

Broiler production in the fourth quarter of 1974 was down 8 percent from a year earlier. Broiler prices in the fourth quarter of 1974 averaged 40.7 cents per pound, 3.8 cents above a year ago.

Feed costs were higher in the fourth quarter of 1974 than a year earlier. Sharply higher corn prices more than offset the effect of lower soybean meal. Corn prices (No. 2 Yellow, Chicago) averaged $3.56 per bushel, up $1.04 from the year before. Soybean meal (44 percent, Decatur) averaged $139 a ton, down $14 from a year ago. The U.S. average price paid for broiler grower feed in the fourth quarter of 1974 was $183 a ton, $22 above a year earlier.

BEST COPY AVAILABLE

Table 1.--Broiler production, live weight, price per pound, value, and civilian per capita consumption, 1934-69[1]

	Production			Average price received by producers per pound	Value of production	Civilian per capita consumption
	Number	Live weight	Pounds produced as percentage of preceding year			
	Millions	Million pounds	Percent	Cents	Million dollars	Pounds
1934	34	97	---	19.3	19	0.5
1935	43	123	126.8	20.0	25	.7
1936	53	152	123.6	20.6	31	.8
1937	68	196	128.9	21.4	42	1.1
1938	82	239	121.9	19.0	46	1.3
1939	106	306	128.0	17.0	52	1.6
1940	143	413	135.0	17.3	72	2.0
1941	192	559	135.4	18.4	103	2.8
1942	228	674	120.6	22.9	155	3.2
1943	285	833	123.6	28.6	238	4.1
1944	274	818	98.2	28.8	235	3.9
1945	366	1,107	135.3	29.5	327	5.0
1946	293	884	79.9	32.7	289	4.1
1947	310	936	105.9	32.3	302	4.3
1948	371	1,127	120.4	36.0	405	5.5
1949	513	1,570	139.3	28.2	443	7.1
1950	631	1,945	123.9	27.4	533	8.7
1951	789	2,415	124.2	28.5	689	10.4
1952	861	2,624	108.7	29.8	754	11.7
1953	947	2,904	110.7	27.1	786	12.3
1954	1,048	3,236	111.4	23.1	747	13.7
1955	1,092	3,350	103.5	25.2	844	13.8
1956	1,344	4,270	127.5	19.6	838	17.3
1957	1,448	4,683	109.7	18.9	886	19.1
1958	1,660	5,431	116.0	18.5	1,002	22.0
1959	1,737	5,763	106.1	16.1	925	22.8
1960	1,795	6,017	104.4	16.9	1,014	23.4
1961	1,991	6,832	113.5	13.9	947	25.9
1962	2,023	6,907	101.1	15.2	1,049	25.6
1963	2,102	7,276	105.3	14.6	1,063	27.0
1964	2,161	7,521	103.4	14.2	1,070	27.5
1965	2,314	8,115	107.9	15.0	1,218	29.4
1966	2,572	8,993	110.8	15.3	1,372	32.2
1967	2,583	9,136	102.1	13.3	1,223	32.7
1968	2,621	9,332	101.6	14.2	1,326	32.8
1969	2,788	10,046	107.7	15.2	1,531	35.3

1/ Includes Alaska and Hawaii beginning in 1961.
2/ Includes consumption in households of producers which is less than 1 percent of total production.

Source: Annual issues of Chicken and Eggs, Production, Disposition, Cash Receipts, and Gross Income, U.S. Dept. Agr., Stat. Rpt. Serv., and Poultry and Egg Situation, Econ. Res. Serv.

Increases in value of production since 1949 have been achieved by substantial increases in pounds produced, since average prices received by producers have trended downward beginning in 1949. From 1948 to 1969, the average price received by producers declined more than 50 percent, while live weight production increased about 890 percent (table 1).

Production Costs

Through the years, production costs probably have paralleled the average equivalent price at the farm level. As shown in table 1, prices declined from 36.0 cents per pound in 1948 to 15.2 cents per pound in 1969. Because production is part of a total firm operation, costs are not known with precision for the past 20 years. However, production costs have probably averaged below prices received by producers.

The greater-than-50-percent reduction in price and cost from 1949 to 1969 was possible because of substantial increases in production efficiency. Primary breeders have improved broiler strains sufficiently to reduce the time needed to produce a 3.5-pound live bird from 12-14 weeks 20 years ago to 8-9 weeks now. Poultry nutritionists have developed improved feed formulations which have helped reduce the amount of feed needed to produce 1 pound of live broiler from 4 pounds in 1940 to 2.2 pounds today. Mortality rates of 10 to 20 percent were common 20 years ago, while a rate of more than 6 percent is considered high today. Man-hours per 1,000 broilers produced declined from 250 in 1940 to 15 in 1969 as a result of increased mechanization, more efficient farm layouts, and larger flock sizes. Recent improvements in modern poultry housing have stressed complete environmental control; that is, control of light, temperature, humidity, and air movement. Although further gains in efficiency are possible, it is difficult to see how they can be of the magnitude of those in the past 20 years.

Production costs in the highly integrated broiler industry include the values of inputs furnished by both the contracting firm and the contract grower. Actual costs per pound of broiler produced vary among flocks and geographic areas, and seasonally. A recent study gave the following typical percentage distribution of production costs (25):

	Percent
Feed	62.4
Chicks	19.2
Grower payment	12.0
Fuel	2.0
Medications	1.6
Vaccination	1.2
Litter	.8
Miscellaneous	.8

EXECUTIVE OFFICE OF THE PRESIDENT

COST OF LIVING COUNCIL

Office of Public Affairs
Room 4013
Washington, D.C. 20507
Phone: 202-254-3240

FOR IMMEDIATE RELEASE
Thursday, January 4, 1973

The Cost of Living Council announced today that it is modifying economic stabilization regulations to include the first sale by producers of broiler chickens and turkeys in the raw agricultural products exemption.

This step is being taken to continue the expansion of poultry production thus better insuring an adequate supply at reasonable prices in the months ahead. Thus poultry producers can plan for expanded production levels with confidence that future production can be marketed in a customary manner.

The first sale of broilers in most instances no longer occurs in live form or at a completely unprocessed stage. Virtually all broilers and many turkeys for slaughter are hatched, grown to slaughter weight, slaughtered, and partially processed before the first sale. The first sale by the poultry producing industry has not been exempt until now. All subsequent sales of dressed poultry products are covered by the applicable Economic Stabilization Program regulations.

The industry is not unlike the fish industry where the killing, scaling, and other processing occurs prior to the first sale. The Council earlier defined "raw seafood" products to include those which have been shelled, shucked, iced, skinned, scaled, eviscerated, or decapitated.

The broiler industry in the post World War II period has been characterized by rapidly expanding production and lower prices. Per capita consumption of all chicken has increased from a level of 27.5 pounds per person in 1957-59 to almost 43 pounds per person in 1972. During this same period prices for broilers have decreased from a level of 31.4 cents per pound to 28 cents per pound. In real terms this decline in price would be even more dramatic. Thus the poultry industry has been a major and growing source of low-cost food for American consumers.

o 0 o

CLC-189

FR 1-3-73 p. 913

United States Department of Agriculture
Economic Research Service
Washington, D.C. 20250

January 24, 1974

Mr. Richard Arnold
Office of Economic Policy
Anti-Trust Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Arnold:

In response to your request, we have refined our method of estimating monthly net returns from producing ready-to-cook whole broilers which we used during the 1973 pre-freeze, price freeze and post-freeze periods. We have extended this analysis back to January 1967. We feel the net returns approach is a far better measure of industry well-being than market prices alone. In "normal" times, there is a well-defined seasonal pattern in broiler demand. But the actual prices which result are influenced by other meat prices and supplies, and occasional exogeneous events. Broiler producers singly or in the aggregate do not always correctly anticipate all these forces in production planning three months earlier. Neither do they correctly anticipate changes in factor costs (such as feed) in advance. If we were to calculate weekly net returns, an even more variable pattern would result, since demand also can shift from week-to-week.

The 9-city weighted average wholesale price is, of course, for ready-to-cook whole birds. Cut-up birds obviously bring more and cost more to produce in total. Over time, the proportion of cut-up birds has trended upward.

The enclosed table presents production and marketing cost estimates for broilers for the January 1967 to September 1973 period. The costs are estimated at the farm and wholesale levels.

The farm level cost is equal to the sum of the estimated feed cost per pound liveweight for broilers and the estimated additional production costs such as chick cost, medication cost, grower payment, and fuel and litter costs. The feed costs are based on a constant feed ration of 29.14 percent soybean meal and 70.86 percent corn. Actual feed rations are much more complex containing many ingredients; however, these two ingredients generally make up a large portion of the ration and can be used to approximate the cost of protein and carbohydrate feed ingredients, respectively. The cost of the ration is then increased by 5 percent to account for small quantities of more expensive ingredients such as minerals and vitamins. The corn and soybean meal costs are based on monthly average prices for number 2 corn in Chicago plus 10 cents per bushel shipping cost and on 49 percent soybean meal in Decatur plus $12.00 per ton shipping cost. Milling and distribution costs are also added to the feed cost.

The estimated additional production costs are equal to the sum of the estimated chick cost, medication cost, fuel and litter costs and the contract grower payment. The additional production costs may be overstated in some cases since broiler contracts differ as to whether the contract grower or the integrator provides all or some portion of the fuel and litter, thus, some double counting should increase the cost by less than one-half cent per pound in cases where the grower is providing all fuel and litter. It should also be noted that broiler grower contracts and feed ingredient costs vary by region of the country, thus, the production costs may be overstated for one region and understated for another.

The marketing costs related to collecting the broilers, transporting them to the processing plant, processing the broilers, and delivering the broilers to the retailers were estimated for 1972 using estimates provided by USDA extension personnel and by processors. Again costs vary regionally due to differences in labor costs, taxes and shipping cost. The 1972 data was adjusted by labor cost and materials cost indicies to estimate the 1967 to 1971 processing costs.

A preliminary analysis of the net returns data in Column 8 of Table 1 indicates that 1968 and 1969 are the only years in which the broiler industry maintained a positive net return for virtually every month. Broiler prices began to fall in mid-1970 creating losses as high as 4.57 cents per pound in December 1970. Price remained low in early 1971 resulting in further losses. The depletion of cash assets during this period should have and did lead to a cutback in broiler production. A study by Gerald O'Mara at North Carolina State University indicates that there is a high positive correlation between the number of broiler chicks placed per month and the accumulative cash assets for the previous five months.

The production costs and wholesale prices of broilers were relatively stable for most of 1972 with very little gain or loss in net returns. However, late in 1972 the increasing feed grain price increased the cost of broiler production resulting in a considerable loss. Finally, the instability of feed grain and meat prices as well as the price freeze led to large fluctuations in net returns for 1973.

Sincerely,

/s/ GEORGE B. ROGERS
Program Leader, Poultry Area
Commodity Economics Division

Enclosures

UNITED STATES DEPARTMENT OF AGRICULTURE
ECONOMIC RESEARCH SERVICE
WASHINGTON, D.C. 20250
Commodity Economics Division

October 21, 1974

OCT 23 10 01 74

Richard Arnold
Economic Policy Office
Anti-Trust Division
Department of Justic

Dear Mr. Arnold:

Enclosed is a revised set of cost and net return estimates on broilers. These are still preliminary estimates which will be subject to additional revision as more data becomes available. They are still only good indicators of direction and level and should not be construed to be official USDA estimates. We will continue to supply you with revised estimates as they become available.

Sincerely,

Verel W Benson

VEREL W. BENSON
Agricultural Economist

Enclosure

Per capita consumption of broilers by months, 1967-73

Year	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Annual
1967	2.652	2.255	2.652	2.522	3.103	3.071	2.725	3.182	2.808	2.914	2.474	2.374	32.8
1968	2.725	2.412	2.525	2.693	2.990	2.761	3.079	3.0[illegible]	2.768	3.192	2.323	2.548	33.1
1969	2.954	2.436	2.615	2.887	3.062	3.122	3.077	3.085	3.125	3.321	2.475	2.984	35.2
1970	3.057	2.742	3.021	3.315	3.141	3.483	3.443	3.212	3.181	3.305	2.635	2.935	37.4
1971	2.904	2.732	3.156	3.077	3.021	3.315	3.167	3.405	3.196	3.208	2.923	3.015	37.1
1972	3.065	2.984	3.244	3.113	3.575	3.552	3.162	3.672	3.149	3.428	3.047	2.854	38.8
1973	3.270	2.803	3.079	2.936	3.523	3.341	3.331	3.441					

DATE											NET RETURNS	PRICE AS A PERCENT OF COST
			(PER TON)	(PER/CWT)								
JAN	1967	...										
FEB	1967	...										
MAR	1967	...										
APR	1967	...										
MAY	1967	...										
JUN	1967	...										
JUL	1967	...										
AUG	1967	...										
SEP	1967	...										
OCT	1967	...										
NOV	1967	...										
DEC	1967	...										
JAN	1968	...										
FEB	1968	...										
MAR	1968	...										
APR	1968	...										
MAY	1968	...										
JUN	1968	...										
JUL	1968	...										
AUG	1968	...										
SEP	1968	...										
OCT	1968	...										
NOV	1968	...										
DEC	1968	...										
JAN	1969	...										
FEB	1969	...										
MAR	1969	...										
APR	1969	...										
MAY	1969	...										
JUN	1969	...										
JUL	1969	...										
AUG	1969	...										
SEP	1969	...										
OCT	1969	...										
NOV	1969	...										
DEC	1969	...										
JAN	1970	...										
FEB	1970	...										
MAR	1970	...										
APR	1970	...										
MAY	1970	...										
JUN	1970	...										
JUL	1970	...										
AUG	1970	...										
SEP	1970	...										
OCT	1970	...										
NOV	1970	...										
DEC	1970	...										
JAN	1971	...										
FEB	1971	...										
MAR	1971	...										
APR	1971	...										
MAY	1971	...										
JUN	1971	...										
JUL	1971	...										
AUG	1971	...										
SEP	1971	...										
OCT	1971	...										
NOV	1971	...										
DEC	1971	...										
JAN	1972	...										
FEB	1972	...										
MAR	1972	...										
APR	1972	...										
MAY	1972	...										
JUN	1972	...										
JUL	1972	...										
AUG	1972	...										
SEP	1972	...										
OCT	1972	...										
NOV	1972	...										
DEC	1972	...										
JAN	1973	...										
FEB	1973	...										
MAR	1973	...										
APR	1973	...										
MAY	1973	...										
JUN	1973	...										
JUL	1973	...										
AUG	1973	...										
SEP	1973	...										
OCT	1973	...										
NOV	1973	...										
DEC	1973	...										
JAN	1974	...										
FEB	1974	...										
MAR	1974	...										
APR	1974	...										
MAY	1974	...										
JUN	1974	...										
JUL	1974	...										
AUG	1974	...										
SEP	1974	...										

DATE											
			(PER TON)	(PER/CWT)							
JAN	1967	...									
FEB	1967	...									
MAR	1967	...									
APR	1967	...									
MAY	1967	...									
JUN	1967	...									
JUL	1967	...									
AUG	1967	...									
SEP	1967	...									
OCT	1967	...									
NOV	1967	...									
DEC	1967	...									
JAN	1968	...									
FEB	1968	...									
MAR	1968	...									
APR	1968	...									
MAY	1968	...									
JUN	1968	...									
JUL	1968	...									
AUG	1968	...									
SEP	1968	...									
OCT	1968	...									
NOV	1968	...									
DEC	1968	...									
JAN	1969	...									
FEB	1969	...									
MAR	1969	...									
APR	1969	...									
MAY	1969	...									
JUN	1969	...									
JUL	1969	...									
AUG	1969	...									
SEP	1969	...									
OCT	1969	...									
NOV	1969	...									
DEC	1969	...									
JAN	1970	...									
FEB	1970	...									
MAR	1970	...									
APR	1970	...									
MAY	1970	...									
JUN	1970	...									
JUL	1970	...									
AUG	1970	...									
SEP	1970	...									
OCT	1970	...									
NOV	1970	...									
DEC	1970	...									
JAN	1971	...									
FEB	1971	...									
MAR	1971	...									
APR	1971	...									
MAY	1971	...									
JUN	1971	...									
JUL	1971	...									
AUG	1971	...									
SEP	1971	...									
OCT	1971	...									
NOV	1971	...									
DEC	1971	...									
JAN	1972	...									
FEB	1972	...									
MAR	1972	...									
APR	1972	...									
MAY	1972	...									
JUN	1972	...									
JUL	1972	...									
AUG	1972	...									
SEP	1972	...									
OCT	1972	...									
NOV	1972	...									
DEC	1972	...									
JAN	1973	...									
FEB	1973	...									
MAR	1973	...									
APR	1973	...									
MAY	1973	...									
JUN	1973	...									
JUL	1973	...									
AUG	1973	...									
SEP	1973	...									
OCT	1973	...									
NOV	1973	...									
DEC	1973	...									
JAN	1974	...									
FEB	1974	...									
MAR	1974	...									
APR	1974	...									
MAY	1974	...									
JUN	1974	...									
JUL	1974	...									
AUG	1974	...									
SEP	1974	...									

- PES 285 MARCH 1975

(f)

POULTRY AND EGG Situation

ECONOMIC RESEARCH SERVICE

U.S. DEPARTMENT OF AGRICULTURE

Table 2—Estimated production costs, total costs, and net returns for Broilers, 1972-74[1]

Period	Production costs		Total wholesale ready-to-cook costs[2 3]	9-city weighted average broiler price[3]	Net returns[3 5 6]
	Feed[3]	Total[3]			
	Cents per pound live weight		*Cents per pound live weight*		
1972					
1st quarter	8.3	13.6	27.2	27.8	0.6
2nd quarter	8.8	14.2	28.0	27.2	-0.7
3rd quarter	9.2	14.6	28.5	29.6	1.1
4th quarter	9.7	15.0	29.2	28.0	-1.2
Annual average	9.0	14.3	28.2	28.2	-0.1
1973					
1st quarter	13.2	18.0	34.0	37.0	3.0
2nd quarter	14.2	20.1	36.9	42.2	5.4
3rd quarter	21.2	27.0	46.5	52.8	6.3
4th quarter	17.6	23.4	41.5	37.2	-4.3
Annual average	16.4	22.2	39.8	42.4	2.6
1974[4]					
1st quarter	16.1	22.3	40.5	39.3	-1.2
2nd quarter	15.2	21.3	39.2	35.3	-3.9
3rd quarter	14.5	20.7	38.3	37.6	-0.7
4th quarter	17.7	23.8	42.6	40.4	-2.3
Annual average	15.8	22.0	40.1	38.0	-2.0

[1] Based on secondary data and incomplete data from survey. Estimated by computerized formula. [2] Weighted by monthly broiler slaughter. [3] Based on farm cost converted to wholesale market values for ready-to-cook broilers. [4] Preliminary. [5] May not add across due to rounding.

Table 3—Estimated production costs, total costs, and net returns for Turkeys, 1972-74[1]

Period	Production costs		Total wholesale ready-to-cook costs[2 3]	New York heavy young hen turkey price[3]	Net returns[3 5 6]
	Feed[3]	Total[3]			
	Cents per pound liveweight		*Cents per pound ready-to-cook*		
1972					
1st quarter	11.9	18.9	32.2	36.9	4.7
2nd quarter	12.9	19.9	33.3	34.8	1.4
3rd quarter	13.5	20.5	34.1	35.3	1.2
4th quarter	14.1	21.1	34.9	38.5	3.7
Annual average	13.5	20.5	34.1	36.6	2.8
1973					
1st quarter	15.4	22.9	37.8	45.1	7.3
2nd quarter	19.8	27.3	43.3	55.9	12.6
3rd quarter	27.0	34.5	52.3	69.2	16.9
4th quarter	28.2	35.7	53.8	67.2	13.4
Annual average	25.6	33.1	50.6	64.5	13.9
1974[4]					
1st quarter	22.1	30.3	48.4	49.9	1.6
2nd quarter	23.6	31.8	50.2	39.2	-11.0
3rd quarter	19.9	28.1	45.6	45.6	-0.1
4th quarter	24.8	33.0	51.7	52.1	0.4
Annual average	22.5	30.7	48.8	47.0	-1.8

[1] Based on secondary data and incomplete data from survey. Estimated by computerized formula. [2] Weighted by monthly turkey slaughter. [3] Based on farm cost converted to wholesale market values for heavy young turkey hens. [4] Preliminary. [5] May not add across due to rounding.

(9)

Egg and Poultry STATISTICS Through 1957

STATISTICAL BULLETIN NO. 249
MAY 1959

AGRICULTURAL MARKETING SERVICE
U. S. DEPARTMENT OF AGRICULTURE

Table 7.8 --Commercial broilers: Production and value, 1934-57

Year	Production		Price per pound	Gross income 1/
	Number	Liveweight		
	Thousands	1,000 pounds	Cents	1,000 dollars
1934	34,030	96,594	19.3	18,661
1935	42,890	122,637	20.0	24,551
1936	53,155	152,217	20.6	31,357
1937	67,915	195,633	21.4	41,809
1938	82,420	239,126	19.0	45,509
1939	105,630	306,132	17.0	52,037
1940	142,762	413,474	17.3	71,621
1941	191,502	558,905	18.4	102,975
1942	228,187	674,087	22.9	154,650
1943	285,293	832,837	28.6	238,262
1944	274,149	817,605	28.8	235,282
1945	365,572	1,107,174	29.5	327,059
1946	292,527	883,855	32.7	288,603
1947	310,168	936,442	32.3	302,170
1948	370,515	1,126,643	36.0	405,171
1949	513,296	1,570,197	28.2	442,530
1950	631,458	1,944,524	27.4	532,652
1951	786,601	2,414,767	28.5	689,317
1952	860,831	2,623,934	28.8	756,182
1953	946,533	2,904,174	27.1	786,324
1954	1,047,798	3,236,248	23.1	746,891
1955	1,078,264	3,309,295	25.2	834,210
1956	1,343,660	4,269,502	19.6	838,450
1957	1,451,661	4,692,603	18.9	887,303

1/ Includes consumption in households of producers which is less than 1 percent of total production.

Data published currently by the Crop Reporting Board.

Statistical Bulletin No. 525

(h)

POULTRY AND EGG STATISTICS THROUGH 1972

ECONOMIC RESEARCH SERVICE / UNITED STATES DEPARTMENT OF AGRICULTURE

Table 15.--Eggs: Production, disposition and value, 1960-72 1/

Year	Average number of layers on hand during the year	Eggs: Produced: Per layer on hand during the year 2/	Eggs: Produced: Total	Eggs: Consumed on farms where produced	Eggs: Sold	Eggs: Price per dozen	Value of: Sales	Value of: Sales and consumption 3/
	Millions	Number	Millions	Millions	Millions	Cents	Mil./dol.	Mil./dol.
1960	295	209	61,462	3,782	57,680	36.0	1,731	1,841
1961	297	210	62,423	3,364	59,509	35.6	1,750	1,848
1962	300	212	63,569	3,026	60,543	33.8	1,703	1,787
1963	298	213	63,500	2,729	60,770	34.5	1,747	1,824
1964	301	217	65,215	2,439	62,776	33.8	1,770	1,836
1965	301	218	65,560	2,056	63,504	33.7	1,785	1,841
1966	304	218	66,205	1,612	64,593	39.1	2,106	2,157
1967	314	221	69,327	1,558	67,769	31.3	1,765	1,804
1968	309	221	68,156	1,393	66,763	34.0	1,893	1,931
1969	307	220	67,546	1,172	66,374	40.0	2,212	2,250
1970	313	218	68,282	1,004	67,277	39.1	2,192	2,224
1971	315	223	70,082	805	69,276	31.4	1,813	1,833
1972 4/	307	227	69,804	682	69,122	30.9	1,781	1,798

1/ Data include Alaska and Hawaii beginning in 1961. Since 1969, data cover the period December 1 previous year through November 30. 2/ Number of eggs produced during the year divided by the average number of layers on hand during the year. 3/ Eggs consumed are valued at same price per dozen as eggs sold. 4/ Preliminary.

Table 16.--Commerical broiler production, average liveweight, price per pound and value, 1960-72 1/

Year	Production: Number	Production: Liveweight	Average liveweight per bird	Average price received by producers per pound	Value of production 2/
	Millions	Million pounds	Pound	Cents	Million dollars
1960	1,795	6,017	3.35	16.9	1,014
1961	1,991	6,832	3.43	13.9	947
1962	2,023	6,907	3.41	15.2	1,049
1963	2,102	7,276	3.46	14.6	1,063
1964	2,161	7,521	3.48	14.2	1,070
1965	2,334	8,111	3.48	15.0	1,217
1966	2,571	8,989	3.50	15.3	1,371
1967	2,592	9,183	3.54	13.3	1,223
1968	2,620	9,326	3.56	14.2	1,326
1969	2,789	10,048	3.60	15.2	1,531
1970	2,987	10,819	3.62	13.6	1,475
1971	2,945	10,818	3.67	13.7	1,487
1972 3/	3,075	11,478	3.73	14.1	1,622

1/ Includes Alaska and Hawaii beginning in 1961. Since 1969, data cover the period December 1 previous year through November 30. 2/ Includes consumption in households of producers which is less than 1 percent of total production. 3/ Preliminary

(i)

chickens, eggs & broilers

PRODUCTION, DISPOSITION, CASH RECEIPTS AND GROSS INCOME, 1972 – 1973 BY STATES

Pou 2-3 (74) April 1974 CROP REPORTING BOARD
STATISTICAL REPORTING SERVICE • U.S. DEPARTMENT OF AGRICULTURE • WASHINGTON, D.C.

BROILERS PRODUCTION AND GROSS INCOME 1972 – 1973 1/

STATE	1972 NUMBER PRODUCED	1972 POUNDS PRODUCED	1972 PRICE POUND	1972 GROSS INCOME 2/	1973 NUMBER PRODUCED	1973 POUNDS PRODUCED	1973 PRICE POUND	1973 GROSS INCOME 2/
	THOUSANDS		CENTS	1000 DOLLARS	THOUSANDS		CENTS	1000 DOLLARS
ALA.	399274	1437386	13.1	188298	399324	1497568	23.4	336390
ARK.	532135	1862473	13.7	254159	501445	1758458	23.7	416281
CALIF.	88022	361292	17.5	63228	83193	341091	24.7	84249
CONN.	3329	13849	16.2	2211	2736	11486	25.5	2924
DEL.	131473	514305	15.7	80748	140967	583868	23.8	136201
FLA.	54855	209824	13.3	27882	56833	215965	23.1	49888
GA.	442937	1638967	13.1	214692	412988	1528068	23.9	365203
HAWAII	2846	7181	33.5	2399	1915	6783	39.5	2668
IND.	13201	58144	14.4	7994	13583	50257	22.9	11509
IOWA	2992	23938	28.0	6702	3888	29168	40.0	11667
KANS.	613	2146	15.6	335	703	2601	23.4	609
KY.	7257	27577	13.5	3723	7238	27508	24.9	6852
LA.	55769	208345	13.9	28882	55508	188731	24.1	45484
MAINE	71344	308779	14.2	43898	75642	317696	25.5	81012
MD.	177247	691263	15.7	108528	190673	743625	23.8	176983
MICH.	566	2943	18.5	544	D	D	0.0	0
MINN.	11039	47468	16.1	7642	11140	49056	28.2	13834
MISS.	256264	948177	13.2	125158	239138	886781	23.5	207924
MO.	23354	88745	13.5	11981	21533	81825	23.6	19311
NEBR.	1733	6412	17.5	1122	2267	9068	28.2	2557
N. J.	650	3575	30.0	1073	625	3500	39.0	1365
N. Y.	1730	6920	23.0	1592	1858	6270	31.0	1944
N. C.	381772	1174911	13.9	163591	790448	1132767	24.5	277523
OHIO	12700	50800	13.3	6756	14000	54600	23.5	12831
OKLA.	21500	77400	13.8	10681	23650	85140	24.9	20436
PA.	59368	243409	16.4	39919	61263	251178	27.5	69074
S. C.	29263	98921	13.2	13058	28853	100986	23.6	23833
TENN.	54967	197863	13.1	25920	52342	177729	22.7	39209
TEXAS	178511	686491	14.2	93790	173330	641321	22.8	146721
VA.	77238	279857	15.1	41987	77168	285522	23.7	67669
WASH.	16394	63944	18.4	11764	17575	68563	26.6	18232
W. VA.	15951	58829	12.5	6979	17301	53633	23.3	12496
WISC.	13136	58459	15.1	8525	14795	62139	26.0	16156
OTHER STATES 3/	17100	62810	17.6	11054	14000	53200	25.0	13300
U. S.	3074921	11498101	14.1	1622638	3008110	11716989	24.0	2808563

1/ COMMERCIAL BROILER PRODUCTION INCLUDING PRODUCTION OF OTHER MEAT-TYPE BREEDS-EXCLUDES STATES PRODUCING LESS THAN 500,000. 2/ INCLUDES HOME CONSUMPTION WHICH IS LESS THAN 1 PERCENT OF TOTAL PRODUCTION. 3/ INCLUDES IDAHO AND OREGON.

75.4% Federally Inspected 96.3%

poultry slaughter

(JL)

December 1974

Release:
January 30, 1975
3:00 P.M. ET

In this Issue:
Slaughter Under Federal Inspection
Poultry Used in Further Processing
Total Poultry Slaughtered

Inspected Poultry - There were 1,036 million pounds live weight of poultry inspected for slaughter during December 1974 by the United States Department of Agriculture. This is 3 percent below the previous month and 6 percent less than December 1973.

Young chickens inspected totaled 819 million pounds, 13 percent more than the previous month, but slightly below December 1973. Mature chickens inspected totaled 60 million pounds, 2 percent less than last year and down 5 percent from last month. Total turkeys inspected at 152 million pounds were down 31 percent from a year ago and 44 percent from November 1974. Duck inspections at 4.5 million pounds were 8 percent below the previous month but about the same as December 1973.

Poultry Certified Wholesome in December totaled 731 million pounds ready-to-cook weight -- down 4 percent from the previous month and 7 percent from December 1973. Of the December 1974 total, 81 percent was chilled and 19 percent was frozen.

Further Processed poultry totaled 135 million pounds ready-to-cook weight -- down 8 percent from December 1973 and 21 percent from November 1974.

Poultry Cut-up and Packaged totaled 219 million pounds ready-to-cook weight -- up 9 percent from December 1973 and 4 percent above last month.

Ante-Mortem Condemnations during December were 3.7 million pounds liveweight. This was 0.35 percent of total quantities inspected, compared with 0.45 percent a year ago. Post-Mortem Condemnations were 20.9 million pounds (NYD weight). This was 2.25 percent of total quantities inspected, compared with 2.76 percent in December 1973.

Total Poultry Slaughtered (including that slaughtered in non-federally inspected plants) during December 1974 was 768 million pounds ready-to-cook weight, down 9 percent from December 1973 and 4 percent from last month.

UNITED STATES DEPARTMENT OF AGRICULTURE
STATISTICAL REPORTING SERVICE CROP REPORTING BOARD
Pou 2-1 (1-75) WASHINGTON, D.C. 20250

POULTRY SLAUGHTERED UNDER FEDERAL INSPECTION, DECEMBER 1974 WITH COMPARISONS

	Young chickens	Mature chickens	Other poultry	Total poultry
Number inspected 3/				
November 1974	191,508	14,492	788	206,788
December 1973	214,700	15,742	730	231,172
December 1974	212,245	14,049	732	227,026
Jan.-Dec. 1973	2,007,557	149,476	10,000	2,167,033
Jan.-Dec. 1974	2,000,628	143,326	11,523	2,155,477
Pounds inspected 4/				
November 1974	726,669	63,791	4,948	795,408
December 1973	819,474	61,527	2,516	883,517
December 1974	818,736	60,215	381	879,332
Jan.-Dec. 1973	10,000,884	933,667	7,218	10,941,769
Jan.-Dec. 1974	10,000,838	951,074	8,018	10,959,930
Average liveweights 5/				
November 1974	3.80	4.39	6.28	3.84
December 1973	3.82	3.44	6.21	3.82
December 1974	3.86	4.30	6.21	3.86
Jan.-Dec. 1973	3.73	4.19	6.39	3.78
Jan.-Dec. 1974	3.78	4.46	6.27	3.83

1/ Of the mature chickens inspected, the number reported in thousands as heavy fowl (broiler breeding stock) was:
November 1974, 2,141 December 1973, 2,441 and December 1974, 2,128.
2/ Of the young turkeys inspected, the number reported in thousands as young hens (roasters) was:
November 1974, 191 December 1973, 561 and December 1974, 28.
3/ Thousands 4/ 1,000 pounds 5/ Pounds

POULTRY: POUNDS CERTIFIED (READY-TO-COOK WEIGHT) 1/

	Young chickens	Mature chickens	Total chickens	Turkeys	Ducks	Other poultry	Total poultry
November 1974							
Chilled	478,345	36,087	514,432	329	75	75	514,911
Frozen	65,198	5,643	70,841	3,175	1,633	1,633	75,649
Total	543,533	40,670	584,601	3,504	1,708	1,708	590,560
December 1973							
Chilled	536,066	31,878	567,944	274	30	30	568,248
Frozen	63,210	6,745	69,955	2,931	204	204	72,290
Total	599,276	38,623	637,899	3,205	234	234	641,338
December 1974							
Chilled	568,782	31,963	600,745	263	8	8	608,916
Frozen	68,869	6,168	75,037	2,953	341	341	78,331
Total	637,651	38,131	675,782	3,141	349	349	687,247
January-December 1973							
Chilled	6,119,554	429,129	7,548,683	1,841	675	675	7,551,199
Frozen	1,446,542	92,361	1,538,903	47,360	3,913	3,913	7,290,176
Total	7,736,096	521,490	8,387,586	49,196	4,588	4,588	8,441,375
January-December 1974							
Chilled	6,536,328	336,328	7,736,656	1,719	266	266	8,121,690
Frozen	1,614,559	100,638	1,715,196	60,613	4,827	4,827	7,222,636
Total	8,150,887	536,967	8,451,852	51,332	5,027	5,027	16,343,884

1/ 1,000 pounds

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

STIPULATION

(Dated June 6, 1975)

The parties hereto, acting by and through their attorneys of record, hereby stipulate as follows:

1. The parties hereby waive all objections with respect to authenticity and hearsay to the admission of the following documents, copies of which are attached hereto, in connection with the Court's consideration of any motion for summary judgment or trial in this action; except that the parties make no stipulation as to the truth, accuracy or relevance of any statement or any statistical data contained therein:

(a) Letter of May 9, 1975, from George B. Rogers to Charles S. Stark, with attachments thereto; and

(b) Letter of May 23, 1975 from George B. Rogers to Charles S. Stark.

2. The parties hereby stipulate that the contracts of present and former members of NBMA, which have been designated confidential pursuant to the Court's Protective Order of December 27, 1973 and copies of which have been filed herewith under seal, are the written contracts in effect between the members and contract broiler growers as of June, 1974, or as of such other date as may be specified on the face of the contract; and the parties waive all objections with respect to authenticity and hearsay to the admission of these contracts in connection with

the Court's consideration of any motion for summary judgment or trial in this action.

3. The parties hereby stipulate as follows with respect to the use in connection with this action of the affidavit of Dr. Irston Barnes and the statistical tables attached thereto, submitted by NBMA in support of its motion for partial summary judgment:

(a) Plaintiff does not contest the accuracy of tables G-4, G-5, G-6 and G-8, and waives any objections on grounds of hearsay to the admission of those tables; except that plaintiff does not concede that the growers for whom data is compiled in Table G-5 are "representative" growers.

(b) Plaintiff does not contest the accuracy of table G-1 and waives any objections on grounds of hearsay to the admission of that table, subject to the following clarification to which the parties agree: that each entry showing that a member has a contractual relationship ("C") with respect to breeder flocks and hatcheries indicates that the member purchases day-old chicks from a separately-owned source; that each "C" entry with respect to feed mills indicates that the member purchases feed from a separately-owned source; and that each "C" entry with respect to processing indicates that the member sells live birds to a separately-owned processing plant on a cash basis.

(c) Plaintiff does not contest the accuracy of the portion of table G-2 that sets forth the number of growers under contract to NBMA members in 1973, and waives any objections on grounds of hearsay to the admission of that portion of the table.

(d) Plaintiff does not contest the accuracy of that portion of table G-2 that specifies whether, with respect to each member, the member or the grower has title to the birds during the grow out period, and waives any objections on grounds of hearsay to the admission of that portion of the table for purposes of establishing the identity of the party having title to the birds. Plaintiff does not, however, concede the accuracy of that portion of the

table insofar as it purports to identify the party having the "risk of loss" during the grow out period, and does not waive any objections with respect thereto.

(e) Plaintiff does not contest that the portion of table G-2 that purports to state whether NBMA members make payments to growers in the event a flock is lost due to disease, whether, with no neglect or in transport, accurately compiles the members' responses to NBMA's survey questionnaire. Plaintiff does not concede, however, that each member's response accurately reflects the member's practice.

(f) Plaintiff does not contest the accuracy of table G-3 and waives any objections on the grounds of hearsay of the admission of that table, with the qualification that plaintiff contests any inference that may be drawn from the table that all NBMA members supply all of the inputs specified without cost to the grower.

(g) Plaintiff does not contest the accuracy of Table G-7, and waives any objection on grounds of hearsay to the admission of that table, with the following qualification and clarification:

(i) Plaintiff does not contest that the table accurately reports NBMA members' representations as to "informal assurances" to growers of further contracts, but does not concede that growers in fact have any contractual or practical guaranty of a continuing contractual relationship.

(ii) The parties agree to the clarification that the data in the last column of the table, setting forth the number of growers lost by each member since 1970 refers only to growers lost to competitors and does not purport to include all growers terminated during the period, either at their own or at the member's initiative.

4. Defendant does not contest the accuracy of plaintiff's Exhibit GX-1, a copy of which is attached hereto, and waives any

objections on grounds of hearsay to the admissibility of the Exhibit in connection with the Court's consideration of any motion for summary judgment or trial in this action.

So stipulated, this 6th day of June, 1975.

/s/ CHARLES S. STARK
Attorney, Department of Justice
Attorney for Plaintiff

/s/ MICHAEL A. DOYLE
Attorney for Defendant
National Broiler Marketing
Association

ROGERS MAY 9, 1975 LETTER

UNITED STATES DEPARTMENT OF AGRICULTURE
ECONOMIC RESEARCH SERVICE
WASHINGTON, D.C. 20250

Commodity Economics Division

May 9, 1975

Mr. Charles S. Stark
Anti-Trust Division
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Stark:

Enclosed is a summary table prepared from a preliminary analysis of our survey data on broiler production costs. Some of our people made a special effort to complete this summary within the time period involved. We do feel these costs are reasonably accurate and complete.

Direct comparison of the individual costs in broiler production in the two regions is difficult. Survey data did not cover the same proportions of flocks in each quarter of the total time period. Moreover, the nature of contract terms and the kinds and proportions of inputs furnished by contract growers and contractors vary within and between regions. Since these costs cover an extended time period, they are not representative of costs at present or in many past months. Costs of producing broilers in any area will vary from month-to-month, depending on feed ingredient prices, seasonality of fuel requirements for brooding, changes in measures of performance, and changes in factor prices.

Because of the time differences in the two area surveys, the table should not be used to conclude that Northeastern costs are necessarily lower than in the South. There is also wide variation between flocks in both regions. However, grower payments in broiler production do tend to average higher in the Northeast than in the South. This is a function of the extent of competition for growers versus other economic alternatives in various areas, distances producing areas are from major markets (shipping costs), and some price premiums obtained for Northeastern broilers over Southern birds due to differences in packs and types of outlets serviced.

The question about the relative shares of grower and contractor costs which are fixed or variable is not a simple one to answer, particularly from the standpoint of the contractor. First, the records which were obtained did not separate contractor costs into fixed and variable components and there is thus no such identification in the cost table. There would be, of course, fixed costs incurred by contractors in operating feed mills and hatcheries as part of an integrated organization. There are, in addition, some small fixed costs

FOIA 115-47
MAY 1 1975

included in other line items under contractor costs. Although not a fixed cost in a strict accounting sense, one could also argue that most production contracts specify a minimum rate of payment to contract growers which is a "fixed" amount.

Most of the cost of feed is represented by ingredients and most of the chick cost by hatching eggs. These are variable. Other variable costs in mills and hatcheries cover labor, energy, supplies, etc., but these are not large in relation to feed ingredients or hatching eggs. Some older studies suggested that about 35 percent of milling costs (not including ingredient cost) were fixed, and that around 18 percent of chick costs (including eggs) were fixed. But embodied fixed costs in a ton of feed (including ingredient cost) would be small, perhaps in the 3-5 percent range. All of the preceding proportions would vary as feed ingredient and hatching egg prices change up and down.

On the basis of the data in the table, grower fixed costs of just under one cent per pound would represent 60-70 percent of grower costs and 35-45 percent of grower payment (which includes return to operator labor and management). Estimates we made using data from the table and fixed cost percentages from older studies suggest contractor fixed costs (in an integrated organization) would be over one cent per pound, and over 5 percent of total contractor costs. If a minimum grower payment were added to the preceding fixed costs, the resulting figure of over three cents per pound would range from 14 to well over 15 percent of total contractor costs. Even with somewhat different figures, it seems apparent that grower fixed costs constitute a substantially higher <u>percentage</u> of total grower costs than contractor fixed costs do of total contractor costs. On the other hand, the <u>absolute</u> amount of fixed costs incurred by contractors exceeds grower fixed costs.

We are also enclosing revised sets of numbers from our program for estimating monthly U.S. broiler costs and returns. These are on two different bases, as discussed below. But the revised figures do not essentially change earlier general conclusions.

The enclosed tables of monthly quarterly and annual estimated costs and returns for broilers were revised April 22, 1975. The first set of tables is based on current monthly feed costs, i.e., monthly average corn and soybean meal prices are paired with wholesale broiler prices for the same month as in previous monthly estimates furnished to you.

The second set of estimates is based on corn and soybean meal prices which were paired with wholesale broiler prices two months in the future, as published in the November 1974 and March 1975 issues of the Poultry and Egg Situation. The data published in the Poultry and Egg Situation is presented only in quarterly and annual form. These estimates will be revised to reflect quarterly marketing cost changes as this information becomes available.

3.

The costs are estimated at the farm and wholesale levels. The farm level cost is the sum of the estimated feed cost per pound liveweight and the estimated additional production costs such as chicks, medication, fuel and litter, labor and overhead. A fixed annual marketing margin is added to the production cost per pound for ready-to-cook broilers to arrive at a wholesale delivered cost. The farm to wholesale marketing margin is the sum of the estimated processing, shipping, and handling costs from the farm to the wholesale level. Production costs other than feed cost vary annually. These costs may overstate the costs for periods of peak seasonal production, however, they may also understate costs for low seasonal production levels. However, sufficient data are not presently available to estimate these cost differences more accurately.

Feed cost per ton is estimated as a function of the price of corn and soybean meal. Specified percentages of corn and soybean meal make up the ration. The monthly average Chicago corn and Decatur soybean meal prices were increased by a shipping cost differential and used as estimates of ingredient costs. In addition, ration costs were increased by 5 percent to account for the small quantities of more expensive ingredients which were added to balance the ration. Milling and distributing costs were also added to all rations.

The tables present the weighted average quarterly and annual cost, price, and net return estimates. The monthly estimates for broilers were weighted by federally inspected slaughter to obtain weighted quarterly and annual averages. The feed cost per pound liveweight is presented separately since it shows the direct effect of feed ingredient costs on the cost of production.

Please note that these data are revised and updated from previous tables sent to you.

We have also sent a copy of this letter to Mr. Michael A. Doyle, attorney for NBMA, in fulfillment of his parallel request for our data.

Sincerely,

George B Rogers

GEORGE B. ROGERS
Program Leader,
Poultry

Broiler Production Costs and Efficiency, Southern and Northeastern Regions, 1972-74 1/

Item	South 2/	Northeast 3/
Sample characteristics		
Farms (no.)	108	118
Flocks sold (no.)	415	592
Broilers sold (1,000)	11,111	25,201
Aver. live wt. (lbs/bird)	3.77	3.96
Mortality (percent)	3.26	4.72
Feed conversion (lbs. feed per lb. broiler)	2.17	2.14
Costs	Average (cents per pound, salable live wt.)	Average (cents per pound, salable live wt.)
Grower:		
Fuel	0.14	0.09 6/
Electricity	0.07	0.10
Litter	0.10	0.03
Hired labor	0.15	0.19 7/
Miscellaneous	0.19 4/	0.02 8/
Total variable	0.65	0.43
Depreciation	0.43	0.42
Interest	0.32	0.21
Insurance	0.08	0.08
Repairs, maintenance	0.11	0.15
Taxes	0.05	0.10 9/
Total fixed	0.99	0.96
Total grower:	1.64	1.39
Contractor:		
Feed	16.65	16.25
Chicks	2.80	2.77
Grower payment	2.30	2.63
Medication, vaccination	0.24	0.34 10/
Fuel	0.14	0.32
Litter	0.02	0.10
Other	0.32 5/	0.11 11/
Total contractor	22.47	22.52

1/ Data collected in the South by Georgia Agr. Exp. Sta., in Northeast by Pennsylvania Agr. Exp. Sta. under cooperative agreements with Econ. Res. Serv., U. S. Dept. of Agr.

2/ Includes Alabama, Georgia, North Carolina, Arkansas, Texas, Mississippi.

3/ Includes Pennsylvania, Maine, Delaware, Maryland, Virginia.

4/ Includes waste disposal, water, dues and other costs.

5/ Includes administration, field supervision, insurance, and miscellaneous. Not all cost items included.

6/ Includes manure and other waste disposal and fuel for heat. See also 7/.

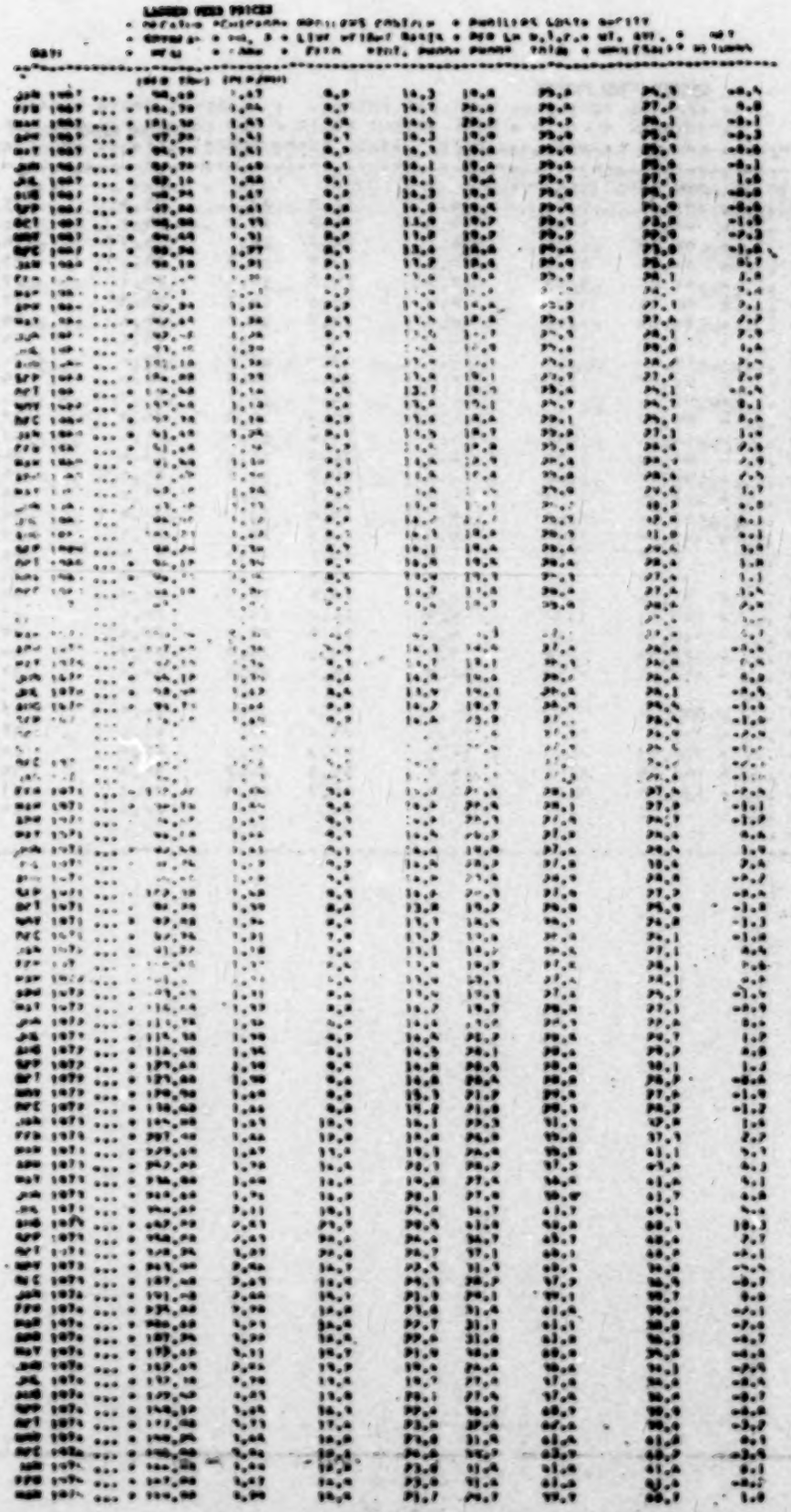
7/ Adjusted for payment in kind frequently associated with manure disposal.

8/ Includes sanitation, dues, and other miscellaneous costs.

9/ Includes rent.

10/ Includes services for sexing, debeaking.

11/ Includes sanitation, electricity, dues and other miscellaneous costs. May not completely include some small items.



DATE	LAGGED FEED PRICES: SOYBEAN MEAL (PER TON)	CORN (PER/BU)	BROILERS COST/LB LIVE WEIGHT BASIS: FEED	START. PROG.	GROW PROG.	BROILERS COSTS PER LB R.T.F.: TOTAL	QUANTITY WT. AVE. WHOLESALE	ESTIMATED NET RETURNS
1967 ...	97.18	1.68	8.1	14.1	18.7	25.9	25.9	-0.9
1968 ...	96.98	1.94	8.4	13.5	18.8	25.4	27.2	1.8
1969 ...	96.11	1.99	8.5	13.8	18.9	26.9	29.9	3.0
1970 ...	98.87	1.62	8.8	14.2	18.7	26.8	26.4	-0.5
1971 ...	94.11	1.68	8.8	14.3	18.8	27.8	27.5	-0.3
1972 ...	113.48	1.98	8.8	14.3	18.8	28.3	28.2	-0.1
1973 ...	273.81	3.11	18.4	22.2	30.8	54.8	42.4	7.6
1974 ...	171.81	3.13	15.8	22.8	30.1	48.1	38.8	-2.8

DATE	• SOYBEAN MEAL	• CHICAGO CORN	BROILERS COST/LB LIVE WEIGHT BASIS FEED	• BROILERS COST PER LB R.T.C. STAT. PHOTO	• QUALITY WT. AVE. PROOF	• ESTIMATED NET WHOLESALE RETURNS TOTAL
	(PER TON)	(PER/BU)				
1ST 1967	• 101.98	1.63	9.6	14.5 28.2	29.2	25.3 -3.9
2ND 1967	• 97.26	1.61	9.5	14.3 19.8	29.0	27.2 -1.3
3RD 1967	• 95.76	1.61	9.2	14.3 19.8	29.0	29.1 0.2
4TH 1967	• 92.76	1.59	9.1	14.1 19.6	29.0	29.6 0.6
1ST 1968	• 92.16	1.58	9.1	14.1 19.6	29.7	25.3 -4.4
2ND 1968	• 90.78	1.57	9.2	14.3 19.8	29.8	29.6 -0.2
3RD 1968	• 97.66	1.61	9.8	14.8 19.5	29.8	27.3 1.8
4TH 1968	• 98.96	1.93	9.8	13.9 19.2	29.3	29.1 -0.2
1ST 1969	• 98.66	1.91	9.8	13.9 19.2	29.2	29.9 +0.3
2ND 1969	• 98.96	1.97	9.9	13.9 19.6	29.6	29.8 +0.2
3RD 1969	• 99.16	1.91	9.1	13.9 19.3	29.6	27.9 +1.4
4TH 1969	• 91.66	1.95	9.9	13.9 19.6	29.9	29.8 +1.8
1ST 1969	• 93.96	1.93	9.9	13.9 19.6	29.9	29.6 -0.3
2ND 1969	• 94.96	1.96	9.9	13.9 19.6	29.9	29.1 -0.8
3RD 1970	• 97.39	1.96	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1970	• 98.96	1.99	9.9	13.9 19.6	29.9	29.9 0.0
1ST 1971	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
2ND 1971	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
3RD 1971	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1971	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
1ST 1972	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
2ND 1972	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
3RD 1972	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1972	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
1ST 1973	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
2ND 1973	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
3RD 1973	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1973	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
1ST 1974	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
2ND 1974	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
3RD 1974	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0
4TH 1974	• 97.66	1.98	9.9	13.9 19.6	29.9	29.9 0.0

DATE	• SOYBEAN MEAL	• CHICAGO CORN	BROILERS COST/LB LIVE WEIGHT BASIS FEED	• BROILERS COST PER LB R.T.C. STAT. PHOTO	• QUALITY WT. AVE. PROOF	• ESTIMATED NET WHOLESALE RETURNS TOTAL
	(PER TON)	(PER/BU)				
1ST 1967	• 98.12	1.62	9.3	14.4 28.0	29.0	29.2 0.2
2ND 1967	• 94.78	1.60	9.1	14.2 19.7	29.7	25.5 -0.2
3RD 1967	• 98.53	1.95	8.8	13.9 19.3	25.3	25.7 0.4
4TH 1967	• 98.54	1.94	8.5	13.3 18.5	24.5	23.3 -1.2
1ST 1968	• 97.46	1.95	8.3	13.4 18.7	25.2	27.2 2.0
2ND 1968	• 95.94	1.97	8.4	13.6 18.9	25.4	27.7 2.2
3RD 1968	• 105.96	1.98	8.4	13.7 19.1	25.4	28.3 2.7
4TH 1968	• 93.71	1.93	8.2	13.4 18.6	25.2	25.5 0.3
1ST 1969	• 91.34	1.90	8.2	13.6 18.9	25.8	28.1 2.3
2ND 1969	• 98.50	1.96	8.7	14.1 19.6	26.4	29.- 2.6
3RD 1969	• 98.12	1.97	8.7	14.0 19.5	26.4	31.1 4.6
4TH 1969	• 94.20	1.88	8.4	13.5 18.1	26.1	27.4 1.3
1ST 1970	• 102.87	1.96	8.7	14.1 19.6	26.8	27.9 1.1
2ND 1970	• 93.63	1.89	8.6	14.0 19.5	26.7	26.7 0.0
3RD 1970	• 103.16	1.96	8.9	14.7 20.6	27.4	26.0 -1.4
4TH 1970	• 98.84	1.87	8.1	14.5 20.2	27.6	25.0 -2.6
1ST 1971	• 95.48	1.87	8.9	14.6 20.3	27.8	26.9 -1.0
2ND 1971	• 94.38	1.86	8.9	14.6 20.2	27.8	28.2 0.4
3RD 1971	• 98.89	1.91	8.8	13.9 19.3	27.8	28.5 1.0
4TH 1971	• 94.84	1.86	8.1	13.6 18.8	26.2	25.0 -1.2
1ST 1972	• 105.69	1.92	8.4	14.0 19.6	27.7	27.8 0.1
2ND 1972	• 118.18	1.91	8.1	14.4 20.1	28.4	27.2 -1.2
3RD 1972	• 124.97	1.92	8.4	14.9 20.7	29.0	29.6 0.6
4TH 1972	• 158.74	1.80	10.8	16.3 22.6	30.8	28.8 -2.0
1ST 1973	• 236.13	1.89	14.8	19.4 27.6	38.5	37.8 -0.7
2ND 1973	• 258.45	2.14	16.2	24.1 34.8	43.8	42.2 -1.6
3RD 1973	• 222.41	2.01	13.9	20.9 29.1	40.6	39.1 -1.5
4TH 1973	• 202.61	2.01	12.6	21.1 29.4	40.6	37.2 -1.4
1ST 1974	• 184.44	2.11	11.5	22.- 31.7	40.7	39.1 -1.6
2ND 1974	• 132.22	2.73	13.4	19.7 27.8	37.8	35.3 -1.7
3RD 1974	• 165.48	3.41	14.0	23.1 31.8	41.8	37.8 -4.0
4TH 1974	• 178.97	4.48	17.4	23.4 32.6	42.6	40.6 -2.0
1ST 1975	• 187.44	5.19	16.8	21.0 29.7	38.7	41.- 2.3

BEST COPY AVAILABLE

DATE	DECATUR SOYBEAN MEAL	CHICAGO NO. 2 CORN	BROILERS COST/LB LIVE WEIGHT BASIS FEED	BROILERS COST PER LB R.T.C. TOT. PROD	BROILERS COST PER LB R.T.C. PROD	U.S. CITY WT. AVG. WHOLESALE TOTAL	ESTIMATED NET RETURNS
	(PER TON)	(PER/BU)					
1967 ...	95.53	1.60	8.9	13.9	19.4	25.6	25.7	-0.2
1968 ...	97.34	1.74	8.4	13.6	18.8	25.4	27.7	1.8
1969 ...	95.86	1.34	8.5	13.9	19.2	26.3	29.2	2.9
1970 ...	99.05	1.48	9.0	14.4	19.9	27.1	26.4	-0.7
1971 ...	95.87	1.40	8.8	14.1	19.4	27.9	27.9	-0.0
1972 ...	126.05	1.48	9.4	14.9	20.1	29.0	28.2	-0.8
1973 ...	178.54	2.91	17.1	22.4	31.8	40.8	42.4	1.6
1974 ...	164.01	3.98	16.8	22.2	30.3	40.3	38.0	-2.3

ROGERS MAY 23, 1975 LETTER

UNITED STATES DEPARTMENT OF AGRICULTURE
ECONOMIC RESEARCH SERVICE
WASHINGTON, D.C. 20250
Commodity Economics Division

May 23, 1975

Mr. Charles S. Stark
Anti-Trust Division
United States Department of Justic
Washington, D.C. 20530

Dear Mr. Stark:

This letter is in response to your telephone request for supplementary information on the investment of broiler growers in buildings and equipment.

The investment costs we obtained in our survey encompassed a mixture of various kinds of housing built at different points in time. Some of these were fully depreciated while others had recently been constructed. Thus, the averages from survey data are much lower than current costs. As of late 1974, current costs were probably up to 30 percent higher in some areas than the survey averages.

Investment costs per bird appear to decline from the Northeast toward the South, mainly because of the differences in predominant types of housing in use. These differences would probably narrow somewhat if relatively more environmentally - controlled houses were built in the South to replace older facilities.

The table below summarized building and equipment costs from our survey. Some examples of what these numbers would mean for selected farm sizes follow. In the South, a grower producing 30,000 birds per batch would have $31,200 invested. In the Northeast, a grower with a capacity of 48,000 birds per batch would have $57,600 invested. These do not include land, other farm equipment, wells, dwellings, etc.

Broiler Grower Investment in Houses and Equipment 1/

Item	Area		
	Maine, Pennsylvania	Delaware, Maryland, Virginia	South 2/
Investment per bird sold			$1.04
Investment per bird capacity	$1.33-1.41 3/	$1.08-1.14 3/	$0.95
Average age of facilities (years)	12.5	13.4	7.2
Square feet per bird when full	.75	.78	0.8

1/ Value of investment for various ages of facilities reported by growers. Based on survey schedules obtained between mid-1972 and mid-1974 by Pennsylvania and Georgia Agricultural Experiment Stations under cooperative agreements with ERS.

2/ Includes Georgia, North Carolina, Alabama, Mississippi, Arkansas, Texas.

3/ First figure excludes housing 20 years or older and equipment 10 years or older which enumerator regarded as fully depreciated. Second figure is grower estimate.

There is, of course, some variation in use of housing capacity. Not all houses are 100 percent full all during the year and the number of batches per year can vary. The pounds produced per house also can vary according to housing types, square feet allowed per bird and average weights grown. It is also difficult to relate investment costs directly to per pound fixed costs because of various rates of depreciation being used.

I trust this information will answer your needs. Again, I had to call on Dr. William Henson at Penn. State and Dr. Harold Jones at Georgia for quick and special analyses of survey data to help develop this response.

I have also sent a copy of this letter to Mr. Michael A. Doyle, attorney for NBMA.

Sincerely,

George B. Rogers/1876

GEORGE B. ROGERS
Program Leader, Poultry

cc: Michael A Doyle.

INFORMATION ABOUT NBMA MEMBERS (GX-1)

Number	Percentage of Broilers Raised By Contract Growers	Number of Growers Remain. At Integrator's Initiative: Total	Inefficiency	Inadequate Facilities	Cutback in # of Growers	Distance From Member's Facilities	Other	Disease	Weather	Provision In Member's Contract Guaranteeing Payment To Grower For Birds That Die As A Result Of Disease Or Weather Conditions	Live Birds Acquired From Sources Other Than Contract Growers
1	100%	23[1]	0	0	23[1]	0	0	No[10]	No[10]	No[10]	50%
2	100%	5	0	0	5	0	0	No	No	No	80%
3	90.5%	2	1	1	0	0	0	No[10]	No[10]	No[10]	40%
4	100%	14	11	2	0	7	1	No	No	No	0
5	97.5%	17	8	8	0	1	0	No[10]	No	No	0
6	100%	9	NA	NA	NA	NA	0	NA	NA	NA	0
7	0	NA	NA	NA	NA	14	0	Yes[5]	Yes[6]	No	0
8	100%	50	24	11	0	0	0	Yes[6]	No[10]	No[10]	20-25%
9	88.0%	40	31	9	0	0	0	No[10]	No	No	0
10	100%	1	0	1	0	0	0	No	No	No	0
11	94.4%	20	19	1	0	0	0	No[10]	No[10]	No[10]	0
12	100%	27	7	2	18	0	0	Yes[10]	Yes[10]	Yes[10]	11-20%
13	100%	127	77	33	17	0	0	No[10]	No[10]	No[10]	10%
14	99.2%	15	5	5	5	2	0	No[9]	No[9]	No[9]	0
15	98.1%	56	51	5	0	7	0	No[10]	No[10]	No[10]	10%
16	85.1%	9	9	0	0	0	0	HR[10]	NR	NR	0
17	100%	15	11	4	0	0	0	No[10]	No[10]	No[10]	11-20%
18	100%	12	10	2	0	4	0	No[10]	No[10]	No[10]	0
19	100%	9[8]	9	0	0	0	0	NR	NR	NR	10%
20	80.0%	0	0	0	0	0	0	NR	NR	NR	0
21	100%	38	34	4	0	0	0	No[10]	No[10]	No[10]	0
22	99.4%	60	46	11	3	12	HR	No[10]	No[10]	No[10]	less than 1%
23	97.5%	NR	NR	NR	NR	HR	HR	HR	HR	HR	less than 1%
24	NR	NR	NR	NR	NA	HR	HR	HR	HR	HR	HR
25	NR	NR	NR	NR	NR	HR	HR	HR	HR	HR	HR
26	0%	NR	NR	NR	NR	HR	HR	HR	NO	NO	HR

Member	Percentage of Broilers Raised By Contract Growers	Number of Growers Terminated At Member's Initiative: Total	Inefficiency	Inadequate Facilities	Cutback In # Of Growers	Distance From Member's Facilities	Other	Provision In Member's Contract Guaranteeing Payment To Grower For Birds That Die As A Result Of Disease Or Weather Conditions: Disease	Weather	Live Birds Acquired From Sources Other Than Contract Growers
27	100%	380	343	63	7	35	32	No[10]	No[10]	-
28	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR
29	100%	33	22	4	0	7	0	No[10]	No	0
30	81.2%	3	0	3	0	0	0[12]	No[10]	No[10]	0
31	100%	20	16	0	0	4	0	No[10]	No[10]	20%
32	100%	226	144	36	46	0	0	No	No	0
33	NR	NR	NR[13]	NR	NR	NR	NR	NR	NR	NR
34	NR	5	5	0	0	0	0	No[10]	No[10]	NR
35	NR	17	10	0	0	1	4[14]	No[10]	No[10]	NR
36	NR	12	NR	NR	NR	NR	NR	No	No	NR
37	100%	13	11	2 or less	0	0	0	No	No	43%
38	98.3%	4	3	0	0	1	0	Yes	No	0
39	100%	24	24	0	0	0	0	No[10]	No[10]	0
40	NR	50	20	30	0	0	0	No	No	NR
41	100%	60[15]	45	13	0	0	0	NR	NR	0
42	100%	207	128	34	45	0	0	No A[16]	No A[16]	less than 1%
43	NR	11	4	6	0	0	1	No[10]	No[10]	NR
44	100%	15	12	0	0	3	0	No	No	less than 2%
45	93.1%	19	14	0	0	2	2	No	No	NA
46	100%	11	10	0	0	1	0	No	No	0
47	99.6%	5	4	1	0	0	0	No[10]	No[10]	0
48	89.4%	0	0	0	0	0	0	No	No	0
49	99.8%	106	102	4	0	0	0	No[10]	No[5]	0
50	100%	28	15	13	0	0	0	No	No[10]	0
51	100%	24	21	3	0	0	0	No[10]	No[10]	0

Member	Percentage of Broilers Raised By Contract Growers	Number of Growers Terminated At Member's Initiative: Total	Inefficiency	Inadequate Facilities	Cutback In # Of Growers	Distance From Member's Facilities	Other	Provision In Member's Contract Guaranteeing Payment To Grower For Birds That Die As A Result Of Disease Or Weather Conditions: Disease	Weather	Live Birds Acquired From Sources Other Than Contract Growers
52	82.7%	25[17]	25	0	0	0	0	No	No	0
53	100%	75	40	20	15	0	0	No	No	0
54	81.0%	26	9	4	0	12	1	No	No	0
55	100%	11	0	0	11[18]	11[18]	0	No[10]	No[10]	0
56	100%	13	6	3	0	0	4	No[10]	No[10]	0
57	100%	34	34	0	0	0	0	Yes[19]	Yes[19]	0
58	83.9%	41[1]	35	6	0	0	0	Yes[19]	No	0
59	95.1%	7	5	0	0	2	0	No[10]	No	0
60	100%	134	52	60	0	22	0	No[B]	No	0
61	100%	15	15	0	0	0	0	No[10]	No[10]	0
62	100%	66	44	7	0	12	3	No	No	0
63	100%	NR	NR	NR	NR	NR	NR	No	No	10%
64	100%	25	13	7	0	5	0	No[10]	No[10]	0

NR (no response from member)

NA (question not applicable to this particular integrator)

A The member firm is organized as a cooperative owned by three distinct corporate members

B The member also owns or controls several affiliated corporations

1. Estimate by member
2. Birds are purchased by co-owned processing plant
3. From outside sources (no explanation). Figure is for 1973
4. Due to uncooperative nature
5. Grower paid $65/1000 on a pro-rata basis for numbers of full weeks the chicks were grown out
6. Grower not paid if negligent
7. low - estimate
   high
8. [illegible] growers terminated for more than one reason
9. Grower paid for live birds delivered. Subsequent condemnation risk borne by integrator
10. Documentation of numbers was different than actual contract term - contract term in response listed
11. Including top 10 [illegible] to build inefficiency and inadequate facilities
12. [illegible] on survey
13. No differentiation between inefficiency and inadequate facilities
14. The 4 under other should be listed under inefficient operations
15. One corporations response to survey question 15(b) lists 37 growers terminated at the member's initiative, but response 16(a-f) lists only 35 growers so terminated
16. Shared if no negligence
17. Response by member to survey question 15(b) lists 20 growers terminated at member's initiative. Responses to questions 16(a-f) indicate 25 is the actual number of growers terminated by the member.
18. 11 terminated due to distance or production cutbacks
19. Shared
20. M-15 and M-20 process their birds through profit-sharing arrangements with the same processing plant. The processor acquires approximately 11% of the broilers it processes from other sources.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,

versus

NATIONAL BROILER MARKETING ASSOCIATION

Civil Action No. 18173

ORDER

This is an action by the United States against the National Broiler Marketing Association (hereinafter referred to as the "NBMA") for an alleged violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Jurisdiction is predicated on 15 U.S.C. § 4. Presently pending are the plaintiff's and defendant's motions for partial summary judgment focusing on the issue of whether NBMA is a cooperative association of agricultural producers exempt from the antitrust laws by virtue of Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, Section 6 of the Clayton Act, 15 U.S.C. § 17 and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455.

The defendant is a non-profit cooperative association, chartered by the State of Georgia since September 15, 1970 under the provisions of the Georgia Cooperative Marketing Act, Ga. Code Ann. §§ 65-201 *et seq.* While NBMA was originally established with capital stock, its articles of incorporation were amended on December 6, 1973 to authorize the conversion of the association to a non-profit membership organization. It is comprised of members that integrate the five stages

of the production of ready-to-cook broilers, including (a) the placement and raising of breeder flocks for the production of eggs for hatching purposes, (b) the hatching of eggs and placement of chicks, (c) the growth of chicks for a period of seven to nine weeks (also referred to as the "grow-out" stage), (d) cooping and hauling of the grown chickens to processing facilities, and (e) the operation of plants to process the broilers for market. All of the member firms, though, do not directly engage in all of these functions. In fact, many conduct one or more of these operations through subsidiaries, affiliated companies, partnerships, joint ventures, or independent contractual arrangements. Usually the chicks are "grown out" through arrangements with independent contractors, known as growers, who provide facilities and certain services necessary for the care of the chickens during this period.

The government contends that this practice of contract growing deprives the NBMA, and its members, of the agricultural exemption under the antitrust laws. The defendant, on the other hand, maintains that despite the arrangements with independent growers, it is entitled to the protection of Section 6 of the Clayton Act, the Capper-Volstead Act and Section 5 of the Cooperative Marketing Act of 1926.

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides that:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

This statute was passed in 1914. Eight years later, Congress enacted the Capper-Volstead Act, 7 U.S.C. § 291, which "was intended to clarify the [Clayton Act's] exemption for agricultural organizations and to extend it to cooperatives having capital stock." *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391 (1967). Therefore, the broad wording of Section 6 of the Clayton Act is limited by the language of the Capper-Volstead Act, and the latter is controlling in describing those entitled to the agricultural exclusion.

7 U.S.C. § 291 states:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

There is no dispute here that the NBMA is an association operated for the mutual benefit of its members, no member is allowed more than one vote because of the amount of stock or capital owned, and that the association does not pay dividends, stock or membership capital in excess of eight percent per annum. In addition, it is conceded that ready-to-cook broilers are agricultural products. The government and the defendant part company, though, over whether the members are engaged in the production of these products as farmers.[1]

The Capper-Volstead Act does not define the terms "engaged in production" or "farmers". Some assistance, although limited, is provided by the legislative history of this act. As the Supreme Court noted in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc., supra*, at 391:

> The reports on both H.R. 13931, the predecessor bill that failed of passage, and H.R. 2373, which became the Capper-Volstead Act, state:
>
> > Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members *as such producers.*" (Emphasis added.) H.R. Rep. No. 24, 67th Cong. 1st Sess. 1 (1921); H.R. Rep. No. 939, 66th Cong. 2d Sess. 1 (1920).

---

[1] The government also denies the NBMA's assertion that the association does "not deal in the products of non-members to an amount greater in value than such as are handled by it for members," as required by the Capper-Volstead Act. The government takes the position that the broilers are not products of the members. This is essentially a restatement of the main argument that the members are not "producers" of agricultural products.

However, the characteristics necessary to qualify as an actual "producer" or "farmer" cannot be adequately discerned from the legislative history.[2]

The government points to subsequent legislation, the Agricultural Fair Practices Act of 1968 (hereinafter referred to as the "Fair Practices Act"), 7 U.S.C. §§ 2301, *et seq.*, as reflecting a congressional design to grant Capper-Volstead immunity to broiler growers only. Portions of the legislative history, especially these excerpts from the Senate Report No. 474, 1968, U.S. Code Cong. & Adm. News, 1867-1874, do indicate that a company contracting with a grower should be considered as a "handler" of agricultural products within the meaning of the Fair Practices Act. However, these references do not demonstrate a clear intent to prevent a "handler" from also qualifying as one "engaged in the production of agricultural products" as a farmer within the meaning of the Capper-Volstead Act.

Even though the legislative background sheds little light on the problem here, guidance is sought from similar situations arising under other statutes. While numerous cases are cited by both parties, the most analogous is *N.L.R.B. v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969). In that case, the United States Fifth Circuit Court of Appeals held that the employer, a poultry farm operator contracting with independent

---

[2] The government quotes from various congressional reports and debates but none of these excerpts articulate exactly who is and who is not a farmer. The debates do suggest that a manufacturer which purchased a product grown by a farmer was not intended to be covered by the Capper-Volstead Act since an amendment allowing such an exemption was defeated. See 62 Cong. Rec. 2227-2228, 2275. However, this source does not reveal the intent of Congress concerning those involved in various stages of production in addition to manufacturing or who already own the products and do not purchase from a farmer.

growers to raise chickens, was engaged in farming as the term is used in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. § 203(f), and that its truck drivers who hauled chickens to market were agricultural employees within the exemption of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3). In reaching that conclusion, importance was attached to facts that the employer owned the chickens, supplied the feed and several follow-up services, retained the risk of loss throughout the entire process and assumed the hazard of market fluctuation which would affect the price of the birds.

The analysis of another case, *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966), cited in *Strain*, is also persuasive. There, the court decided that a corporation engaged in the processing and marketing of eggs was within the agricultural exemption of the Fair Labor Standards Act, 29 U.S.C. § 213, despite the company's practice of procuring eggs from independent contract growers. Essential to this resolution was the finding that the employer was a farmer. *Id.* at 258. The court examined several factors similar to those emphasized in *Strain*, and observed that the employer owned both the chicks and the eggs, supplied the feed and medicine and accepted the risk of loss of the producing stock while the growers provided the premises, labor and equipment in raising the birds. Farming was the business of the corporate employer and its president since "but for their investment and other help, the independent growers would arguably never have raised the egg-producing birds themselves." *Id.* at 260.

While *Strain* and *Tyson's Poultry* do not involve an interpretation of the antitrust exemption, they do look to the total participation of the contractor to determine if that involvement is sufficient to warrant classifying him as a "farmer" or "producer." The task, then, is to examine the facts as they relate

to the ownership of the broilers, the services furnished during the "grow-out" stage and the risks associated with the raising of broilers.

Generally, the NBMA members own the chickens and retain title to them until grown. The government cites the contracts of three members, labelled M-27, M-46 and M-47, claiming that they either have no interest in the chickens or share ownership with the growers. However, M-27 is unique because it, too, is an agricultural co-operative and its members are also the growers. Hence, they and their association would be entitled to the agricultural exemption even under the government's test. The contract of M-46 stipulates that the member and the grower shall have joint title to the poultry but it also provides that upon the contractor's repayment of the loan extended by the Production Credit Association, the chickens become the sole property of the member company. The undisputed affidavit of Ronald W. Cameron, president of M-46, states that this contract provision is used simply for financing purposes. The grower is not required to pay the contractor for the one-half interest in the birds and the risk of loss is borne by the member and not the grower. The agreement between M-47 and its growers does specify that the chicks are sold to the grower, but according to the president of M-47, this is again merely a financing arrangement. The grower pays no cash to M-47 but instead signs a note payable to the contractor who then discounts it with recourse to a local bank or the local Production Credit Association. M-47 never called on a grower to pay a note and has never paid a grower less than the amount of the note.

There is no dispute that the growers furnish the land, buildings and equipment, water, electricity and labor for raising day-old chicks to marketable size and weight. On the other hand, the NBMA members provide the chicks, feed, medicines, vac-

cines and veterinary services. In addition, the members make all decisions with respect to the number and timing of chick placements, the diets and other growing conditions and the age and size at which the broilers shall be marketed. Thus, the division of services supplied by the contractor and grower in the "grow-out" period is very similar to *Strain* and *Tyson's Poultry*.

The members of NBMA also bear substantial risks associated with actual raising of the broilers. The government urges that certain contracts suggest that the grower must pay for broiler losses. These contractual provisions, though, apply in only limited circumstances, for example, where there is loss from theft (M-10), fire resulting from the grower's negligence (M-42) or the use of unauthorized pesticides (M-50). Moreover, the affidavit of Irston R. Barnes, an economic consultant, establishes that, in practice, the members and not the growers run the chance of loss from disease or natural disaster and most make payments to the growers if the flock is lost in transport.[3]

From the standpoint of total investment, the members of the NBMA have a significant stake in producing broilers. It is clear that approximately 90% of the live bird cost is attributable to the input supplied by the members. The government's approach to this investment participation is to emphasize the large contribution of the grower for land, buildings and equipment. Because the grower accepts some uncertainty in the venture does not disprove the substantial investment risks incurred by the members. Additionally, the average costs of the building and land and equipment is only a small part of the total

[3] Many members also pay for losses due to disease and weather. See Table G-2, Affidavit of Irston R. Barnes. The fact that some do not shoulder this burden does not mean that the grower takes the loss. Apparently, the grower in these cases does not receive any compensation for his services, but since the title is in the contractor, the member foregoes not only the potential profits but also must pay for the cost of the bird.

average costs of raising a broiler. See Stipulation. Table attached to Letter of George B. Rogers dated May 9, 1975.[4]

Finally, the member must take much of the risk of the market place. Feed, which accounts for over half of the total costs, is paid for by the contractor. The government points to numerous contracts with provisions tying the grower payments to the cost of feed. However, these agreements do not permit the contractor to pass all of the feed costs and the fluctuations in price on to the grower. Generally, the terms cited merely insert into a formula the costs of feed supplied to a grower. An

[4] This table covers the period of 1972-74 and itemizes the average costs of broiler production in the South and Northeast as follows:

Costs	Average [South] (cents per pound, salable live wt.)	Average [Northeast] (cents per pound, salable live wt.)
Grower:		
Fuel	0.14	0.09
Electricity	0.07	0.10
Litter	0.10	0.03
Hired Labor	0.15	0.19
Miscellaneous	0.19	0.02
Total variable	0.65	0.43
Depreciation	0.43	0.42
Interest	0.32	0.21
Insurance	0.08	0.08
Repairs, maintenance	0.11	0.15
Taxes	0.05	0.10
Total fixed	0.99	0.96
Total grower:	1.64	1.39
Contractor:		
Feed	16.65	16.25
Chicks	2.80	2.77
Grower payment	2.30	2.63
Medication, vaccination	0.24	0.34
Fuel	0.14	0.32
Litter	0.02	0.10
Other	0.32	0.11
Total contractor	22.47	22.52

[All footnotes omitted.]

average cost for all growers is then determined and payments are varied according to deviations from the average. The more efficient grower receives greater income for his efforts.

The member, not the grower, markets the broilers. Since the ready-to-cook broiler market is influenced by weekly price fluctuations, and sometimes subject to wide variation within a year, the members face significant risks in selling their chickens. The government argues, though, that payments to some growers vary with the market price. While this is correct, it proves only that the growers in these circumstances also take some chance of the market place, not that the members face no such risks. Secondly, the hazards for the growers are significantly decreased by minimum payment guarantees in the contracts with the member companies.

In light of these facts, the involvement of the members of the defendant association in the production of the broilers is sufficient to justify their classification as "[p]ersons engaged in the production of agricultural products as farmers . . ." within the meaning of the Capper-Volstead Act and to permit their claim to the antitrust exemption to the extent permitted by that statute.[5]

Accordingly, the defendant's motion for partial summary judgment is granted and the plaintiff's cross-motion for partial summary judgment is denied.

So ordered this the 26 day of August, 1975.

/s ALBERT J. HENDERSON, JR.
Judge, United States District
Court for the Northern
District of Georgia

---

[5] Due to the result reached here, it is not necessary to decide whether the NBMA and its members are also entitled to protection of the Co-operative Marketing Act of 1926.

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

STIPULATION

(Dated February 26, 1976)

The parties, by their respective attorneys, hereby stipulate and agree as follows:

1. Defendant consents to the filing by plaintiff of an amended complaint in the form attached hereto, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

2. For purposes of all further proceedings in this action, all facts set forth in "Government's Statement of Material Facts," filed June 6, 1975, and in defendant's "Statement of Material Facts Not in Dispute," filed June 20, 1975, are not in dispute.

3. Plaintiff shall not be precluded from filing a separate action at any time based in whole or in part upon those allegations set forth in paragraphs 4, 7 and 10 of its original complaint that are not set forth in its amended complaint, filed pursuant to this stipulation; and defendant waives and relinquishes any defense which might otherwise be asserted in any such separate action based upon the contention that those allegations could have or should have been tried as part of the present action.

Dated: February 26, 1976

/s/ MICHAEL A. DOYLE
Attorney for Defendant

/s/ CHARLES S. STARK
Attorney for Plaintiff

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

ORDER

The parties hereto acting by and through their respective attorneys having consented, it is hereby ordered that the Amended Complaint annexed hereto be allowed and filed.

This 26th day of February, 1976.

/s/ ALBERT J. HENDERSON, JR., Judge
United States District Court

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AMENDED COMPLAINT

(Filed February 26, 1976)

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the defendant named herein and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act, in order to prevent and restrain the violation by the defendant, as hereinafter alleged, of Section 1 of that Act (15 U.S.C. §1).

2. The defendant transacts business and is found within the Northern District of Georgia, Atlanta Division.

II

The Defendant

3. National Broiler Marketing Association (hereinafter referred to as "NBMA"), is made the defendant herein. NBMA is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business in Jackson, Mississippi. It is an association whose members are persons, firms or corporations engaged in the marketing of broilers.

III

Co-Conspirators

4. Each member of NBMA, not made a defendant herein, has participated as a co-conspirator and is a party with the defendant in the combination and conspiracy in violation of Section 1 of the Sherman Act, as hereinafter alleged.

IV

Trade and Commerce

5. Broilers are chickens that have been grown for a period of 8-10 weeks and then slaughtered and processed for sale to customers such as supermarkets, hotels, restaurants and institutions. There are several different grades of broilers; grades less than Grade A are referred to in the industry as undergrades.

6. The production of broilers requires an investment in farm land, buildings and equipment. While historically the production of broilers was carried on by persons who had made this investment, in recent years a substantial part of the production of broilers has been carried on through the use of contract grower arrangements. These arrangements generally provide that the contract grower will raise the broilers from chickens supplied by a processor. While in most cases the processor at all times owns the broilers, the contract grower bears the substantial part of the risk of loss of the investment in the farm land, buildings and equipment needed to produce the broilers. Substantially all of the broilers marketed by members of NBMA are produced for these members by contract growers under arrangements such as those described above.

7. During the period of time covered by this complaint, the members of NBMA have sold and shipped substantial quantities of broilers to customers located in states other than the state in which said broilers were raised and slaughtered, and in other countries. In 1972, broiler slaughter by firms that were NBMA members at the end of the year amounted to more than 4,137,000,000 pounds, or approximately 37% of all broilers slaughtered in federally inspected plants. The activities of NBMA and its members, as described herein, are within the flow of and have an effect upon interstate commerce.

V

Violation Alleged

8. Beginning at least as early as 1970, the exact date being to the plaintiff unknown, and continuing up to and including the date of the filing of this complaint, the defendant and the co-conspirators have been engaged in a combination and conspiracy to fix, maintain and stabilize the price of broilers, in unreasonable restraint of the aforesaid interstate trade and commerce in broilers in violation of Section 1 of the Sherman Act.

Such unlawful combination and conspiracy is continuing and will continue unless the relief hereinafter prayed for is granted.

9. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendant and the co-conspirators, the substantial terms of which have been and are:

(a) to exchange information about past, present and future prices for broilers;

(b) to establish and disseminate a price for broilers;

(c) to sell broilers at or above that price;

(d) to report to NBMA surplus broilers that cannot be sold at that price;

(e) to sell undergrades at agreed on discounts from the Grade A price;

(f) to withhold broiler parts from the market in order to increase their price;

(g) to exchange information about past, present and future production of broilers; and

(h) to sell surplus broilers to customers in foreign countries.

10. For the purpose of effectuating the aforesaid combination and conspiracy the defendant and the co-conspirators have done those things which as hereinbefore alleged they combined and conspired to do.

VI

Effects

11. The aforesaid combination and conspiracy has had the effect, among others, of raising, stabilizing and maintaining the prices of broilers at non-competitive levels.

VII

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendant and the co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in broilers, as hereinabove alleged, in violation of Section 1 of the Sherman Act.

2. That the defendant and each of its officers, directors, agents, employees, and all persons acting under and through or for defendant be perpetually enjoined and restrained from:

(a) Continuing to carry out, directly or indirectly, the combination and conspiracy hereinbefore alleged, or from engaging in any other combination or conspiracy having a similar purpose or effect, or from adopting or following any practice, plan, program, or device having a similar purpose or effect;

(b) Furnishing to, or requesting from, any processor of broilers, any information concerning prices, terms, or conditions for the sale of broilers; and

(c) Entering into any agreements, arrangements, or understandings with any other persons to eliminate or suppress competition in the sale of broilers.

3. That defendant be ordered to make whatever changes are necessary in its organization and operation to insure compliance with the judgment of this Court.

4. That the plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises.

5. That the plaintiff recover the costs of this suit.

/s/ THOMAS E. KAUPER
Assistant Attorney General

/s/ BADDIA J. RASHID
/s/ GERALD A. CONNELL
/s/ CHARLES S. STARK
/s/ LARRY R. PATTON
/s/ ELLIOT R. WARREN
Attorneys, Department of Justice

(Certificate of Service omitted in printing)

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

ANSWER TO AMENDED COMPLAINT

(Filed March 9, 1976)

Comes now National Broiler Marketing Association (hereinafter sometimes referred to as "NBMA"), named as defendant in the above-styled action, and files this its Answer to the Amended Complaint:

First Defense

In answer to the allegations of the Amended Complaint, defendant shows to the Court the following facts:

1

Defendant admits that plaintiff, the United States of Amer-

ica, instituted these proceedings under Section 4 of the Sherman Act, but denies that it has violated Section 1 or any other section of that Act. Defendant further denies that the Sherman Act is applicable to it, or to its activities as alleged in the Amended Complaint.

2

Defendant admits the allegations contained in paragraph 2 of the Amended Complaint.

3

Defendant National Broiler Marketing Association admits that it is defendant in this action.. Defendant further shows that it is a non-profit cooperative association of persons engaged in the production of agricultural products, organized, existing and operating pursuant and subject to the Georgia Cooperative Marketing Act, as amended, Ga. Code Ann. § 65-201 *et seq.* Defendant has its principal place of business in Jackson, Mississippi. Its members are individuals, firms, partnerships, corporations and associations engaged in the production and marketing of broilers, an agricultural product. To the extent the allegations of paragraph 3 of the Amended Complaint are inconsistent with the allegations contained in this paragraph 3 of the Answer, they are denied.

4

Defendant denies each and every allegation contained in paragraph 4 of the Amended Complaint. Defendant further shows that neither it nor any of its members has violated Section 1 of the Sherman Act nor participated in any combination or conspiracy in violation of Section 1 of the Sherman Act, as referred to in the Amended Complaint.

5

Defendant admits the allegations contained in paragraph 5 of the Amended Complaint. Defendant shows, however, that the

functions of growing, slaughtering and processing referred to in the first sentence of said paragraph describe only some of the functions necessary to produce broilers.

6

Defendant denies the allegations of paragraph 6 as a whole, because they are over-simplified, and as a consequence they are incomplete, inaccurate, and therefore misleading. Defendant answers the specific sentences of paragraph 6 as follows:

In answer to the first sentence, defendant shows that the production of broilers requires buildings, equipment, feed, vaccines, foundation breeder stock, breeders, medicines, labor, and other inputs, all of which constitute an interlocking system of component parts. None is sufficient without the other.

Defendant denies the second and third sentences of paragraph 6. By way of further answer, defendant shows that in the 1920's and most of the 1930's, poultry sold for meat was primarily an incidental result of keeping laying flocks for egg production. At that time, broilers were typically allowed to range free; their production was accomplished without investment in specialized land, buildings, or equipment. In response to consumer demand, the production of poultry grew from an incidental barnyard operation into a highly efficient industry which now supplies a major source of meat protein to the American consumer. As the volume of broiler production increased, the nature of the interrelationships between various functions in the production of broilers has changed. Presently, an integrated producer will normally direct the separate production functions of a hatchery, numerous satellite hatchery supply flocks, a group of growing facilities, a feed mill, and one or more processing plants. This direction can be effectuated by contract, by common ownership, or by a course of dealing. As a part of this operation, usually a grower under contract to the integrated producer will provide labor and facilities to raise day-

old chicks for eight to ten weeks. The integrator supplies the chicks, feed mixed to his own formula, the vaccine, medications, and also supervises the grow-out process. At the end of the grow-out period, the bird is returned to the integrator for slaughtering, processing, and marketing as a broiler.

Defendant denies the allegations of the fourth sentence of paragraph 6. Defendant admits that under the type of contract grower arrangement alleged by the Amended Complaint, the contract grower bears a part of the risk of production, but defendant shows that the integrated producer of broilers also bears a substantial part of the risk of production, specifically including the marketing risks of price fluctuations, and various forms of losses.

Defendant denies the allegations of the fifth sentence of paragraph 6, but shows that the members of NBMA produce a large part of the broilers they market by the use of a contract grower arrangement as described hereinabove.

7

Defendant admits the allegations of paragraph 7 of the Amended Complaint.

8

Defendant denies each and every allegation contained in paragraph 8 of the Amended Complaint.

9

Defendant denies each and every allegation contained in paragraph 9 of the Amended Complaint (and in each and every subparagraph thereof).

Further answering, defendant shows that it has collected and disseminated pertinent and accurate information concerning the business of broiler production, including the amount of production of broilers, the costs of production, market prices, the supplies of broilers available to be marketed, and other information as to the essential elements of the economics of the broiler business. Neither defendant nor its members has combined, conspired or agreed, directly or indirectly, to lessen production arbitrarily or to raise prices beyond their normal levels, which are set by the individual initiative of the members based on full information.

Defendant further shows that its information and statistics have been made publicly available, to both buyers and sellers, who may apply to those facts their individual intelligence, enlightened by accurate information.

Defendant further shows that a special, necessary and historic practice of the broiler industry is for broilers to be sold by producers on a week-to-week basis, and that this practice, when combined with the extremely perishable nature of the broiler produced, and the necessity for the producer to sell the broiler within an extremely short time span, results in and requires the conclusion that the activities of NBMA are not in restraint of trade as alleged.

10

Defendant denies each and every allegation contained in paragraph 10 of the Amended Complaint.

11

Defendant denies each and every allegation contained in paragraph 11 of the Amended Complaint.

Second Defense

In addition and in the alternative to its other defenses raised herein, defendant shows to the Court the following facts:

Defendant is a non-profit association of persons engaged in the production of agricultural products, which was organized, and is existing and operating pursuant and subject to the

Georgia Cooperative Marketing Act, as amended, Ga. Code Ann. § 65-201 *et seq.* Members of defendant are persons engaged as farmers in the production of agricultural products. Defendant's members act together through defendant in collectively marketing their agricultural products in interstate and foreign commerce, within the intent and meaning of the Act of Congress of February 18, 1922, commonly known as the Capper-Volstead Act (7 U.S.C. § 291). Defendant and its activities are, therefore, exempt from the antitrust laws specifically including Section 1 of the Sherman Act.

Third Defense

In addition and in the alternative to its other defenses raised herein, defendant shows to the Court the following facts:

Defendant and its activities are exempt from the antitrust laws, specifically including Section 1 of the Sherman Act, by virtue of the Act of Congress of July 2, 1926 (7 U.S.C. § 451, *et seq.*) in that defendant's members are persons engaged as original producers of agricultural products, as that term is defined in Section 1 of the Act (7 U.S.C. § 451), who have acted together in the corporate association of defendant NBMA in collectively marketing their products in interstate and foreign commerce.

Fourth Defense

In addition and in the alternative to its other defenses raised herein, defendant shows to the Court the following facts:

The antitrust laws, specifically including Section 1 of the Sherman Act, are inapplicable to defendant and its activities by virtue of the Act of Congress of July 2, 1926 (7 U.S.C. § 451 *et seq.*) in that defendant's members are persons engaged as original producers of agricultural products, as that term is defined in Section 1 of the Act (7 U.S.C. § 451), who have

acted together in the corporate association of defendant NBMA in collectively marketing their products in interstate and foreign commerce.

Fifth Defense

In addition and in the alternative to its other defenses raised herein, defendant shows to the Court the following facts:

The organization, operation, and activities of defendant have been taken pursuant to lawful government programs established for a public purpose, and are the intended result of Congressional and state purpose. This purpose is declared, among other places, in the Capper-Volstead Act, 7 U.S.C. § 291 *et seq.*, the Cooperative Marketing Act, 7 U.S.C. § 451 *et seq.*, the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621 *et seq.*, and the Georgia Cooperative Marketing Act, Ga. Code Ann. § 65-201 *et seq.* Such particularized governmental purpose in the regulation of the field of agricultural marketing has not been, and cannot be, preempted by a general statute of uncertain application like the Sherman Act. As a consequence, therefore, the Sherman Act is inapplicable to the organization, operation, and activities of defendant.

Sixth Defense

In addition and in alternative to its other defenses raised herein, defendant shows to the Court the following facts:

By amendment of its charter effective December 6, 1973, NBMA cancelled all outstanding shares of stock in the Association and converted from a stock cooperative to a non-stock, membership cooperative of agricultural producers. Defendant NBMA is now an agricultural organization, instituted for the purposes of mutual help, and not having capital stock or conducted for profit. Pursuant to the provisions of Section 6 of the Clayton Act, 15 U.S.C. § 17, NBMA and its members are

therefore exempt from the prohibitions of the Sherman Act and other antitrust laws and the said antitrust laws are inapplicable to the conduct of the Association and its members.

Prayer

Wherefore, having fully answered the Complaint, defendant prays as follows:

(a) that the amended complaint be dismissed with prejudice;

(b) that the Court adjudge and decree that defendant is a duly organized cooperative association whose members are producers of agricultural products, entitled to act together in said association pursuant to the Capper-Volstead Act, 7 U.S.C. § 291 *et seq.*, Section 6 of the Clayton Act, 15 U.S.C. §17, and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. §455 and that the activities of defendant and its members as alleged in the Amended Complaint are exempt from the antitrust laws, specifically including Section 1 of the Sherman Act, by virtue of and in accordance with the aforesaid statutes;

(c) that defendant recover the costs of this action from the plaintiff; and

(d) that defendant have such other and further relief as this Court may deem just and proper.

This 5th day of March, 1976.

/s/ SIDNEY O. SMITH, JR.
/s/ MICHAEL A. DOYLE
/s/ FREDERICK H. VON UNWERTH
/s/ PETER KONTIO

Of Counsel:
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303
(404) 588-0300

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Plaintiff. v. NATIONAL BROILER MARKETING ASSOCIATION, Defendant.	Civil Action. No. 18173.

ORDER

This is an action for injunctive relief brought by the United States against the National Broiler Marketing Association (hereinafter referred to as "NBMA") for alleged violation of the antitrust laws. Jurisdiction is predicated on 15 U.S.C. § 4, and the amended complaint charges that NBMA has conspired with its members to fix, stabilize and maintain the prices of broiler chickens in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. NBMA has denied the Government's substantive allegations and has further defended by asserting claim to various statutory exemptions from the antitrust laws by virtue of its status as an agricultural cooperative.

In earlier proceedings in this case, plaintiff and defendant each filed motions for partial summary judgment which focused on the issue of whether NBMA is a cooperative association of agricultural producers exempt from the antitrust laws by virtue of Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, Sec-

tion 6 of the Clayton Act, 15 U.S.C. § 17, and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455.

By Order dated August 26, 1975, this Court granted NBMA's motion for partial summary judgment, finding that the involvement of the members of the defendant Association in the production of broilers is sufficient to justify their classification as "[p]ersons engaged in the production of agricultural products as farmers . . ." within the meaning of the Capper-Volstead Act such as to permit their claim to the antitrust exemption to the extent permitted by that statute. That Order did not entirely dispose of this action because plaintiff contended that, even if defendant were an exempt cooperative, the scope of activities protected by the exemption was not as broad as the allegations of the Complaint.

On February 26, 1976, the Government amended its complaint to eliminate those allegations relating to activities which it contended were outside the scope of the exemption. The amended complaint now charges a violation of the Sherman Act by reason of activities all of which plaintiff concedes are within the protection afforded to qualified cooperatives of agricultural producers by the statutory exemptions. Plaintiff does not, of course, concede that defendant is qualified for the exemptions, and on this motion adheres to its earlier argument that defendant's members are not "producers" for purposes of the statutory exemptions because of their use of contract growers in raising broilers to marketable age.

Defendant has answered the amended complaint, and now moves for summary judgment, seeking dismissal of the action and a final judgment declaring defendant to be a duly organized cooperative of agricultural producers entitled to the various exemptions. The Government does not dispute that if NBMA is a qualified cooperative, the exemptions provide a complete defense to the allegations of the amended complaint and the action

must be dismissed. In the August 26, 1975 Order, the Court held that defendant qualifies for the exemption under the Capper-Volstead Act and Section 6 of the Clayton Act.[1] The Court adheres to that finding now. Thus, as a result of the amended pleadings, and in light of this Court's August 26, 1975 Order, the matter is now ripe for the entry of final judgment in defendant's favor.

In the stipulation entered into by the parties and filed in connection with the amended complaint on February 26, 1976, the parties agreed that the facts set forth in the "Government's Statement of Material Facts" filed June 6, 1975 and in defendant's "Statement of Material Facts Not in Dispute" filed June 20, 1975 are not disputed in these proceedings. Both of these statements incorporate references to the record sources underlying each statement of fact, and together they constitute the facts upon which the August 26 Order and the present Order are based. The Court hereby adopts these statements of the material facts, and finds that there is no genuine issue as to any of them.

On the basis of the undisputed facts, and for the reasons stated herein and in the previous Order granting defendant's motion for partial summary judgment, the Court concludes that defendant NBMA is entitled to the judgment it seeks as a matter of law.

Therefore it is Ordered, Adjudged and Decreed that

Defendant National Broiler Marketing Association is declared to be a duly organized cooperative association whose members are producers of agricultural products, entitled to act together in defendant Association pursuant to Section 1 of the Capper-

[1] That Order did not reach the question of whether NBMA and its members are also entitled to protection of the Cooperative Marketing Act of 1926.

Volstead Act, 7 U.S.C. § 291 and Section 6 of the Clayton Act, 15 U.S.C. § 17, and the activities of defendant and its members as alleged in the amended complaint are exempt from the antitrust laws, specifically including Section 1 of the Sherman Act, by virtue of and in accordance with those statutes, and plaintiff's amended complaint is dismissed with prejudice.

Let judgment enter accordingly.

This 16 day of March, 1976.

/s/ ALBERT J. HENDERSON, JR.
ALBERT J. HENDERSON, JR., Judge,
United States District Court for the
Northern District of Georgia

In the United States District Court for the Northern District of Georgia, Atlanta Division

United States of America, Plaintiff, v. National Broiler Marketing Association, Defendant.	Civil Action No. 18173

FINAL JUDGMENT

(Filed March 16, 1976)

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge presiding; and the issues having been duly considered and a decision having been duly rendered, granting defendant's Motion for Summary Judgment,

It Is Ordered and Adjudged That:

1. Plaintiff's amended complaint be and it hereby is dismissed with prejudice;

2. Defendant National Broiler Marketing Association be and it hereby is declared and adjudged to be a duly organized cooperative association whose members are producers of agricultural products, entitled to act together in said association pursuant to Section 1 of the Capper-Volstead Act, 7 U.S.C. §291 and Section 6 of the Clayton Act, 15 U.S.C. §17, and the activities of defendant and its members as alleged in the amended complaint are exempt from the antitrust laws, specifically including Section 1 of the Sherman Act, by virtue of and in accordance with the aforementioned statutes; and

3. Defendant National Broiler Marketing Association recover of the plaintiff its costs of this action.

Dated in Atlanta, Georgia, this 16th day of March, 1976.

/s/ LORRAINE NOLTING,
Deputy Clerk
Clerk of the Court
By: Deputy Clerk

Filed and Entered in Clerk's Office This 16th day of March, 1976.

BEN H. CARTER, Clerk

By: LORRAINE NOLTING
Deputy Clerk

(Corrected)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

NATIONAL BROILER MARKETING ASSOCIATION,
Defendant-Appellee.

No. 76-2115.

United States Court of Appeals,
Fifth Circuit.

April 22, 1977.

Government brought antitrust action against association of companies which marketed broiler chickens. The District Court for the Northern District of Georgia, Albert J. Henderson, Jr., Chief Judge, dismissed and Government appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that broiler integrators which performed many of the tasks necessary to bring broiler chickens to consumers but which did not actually grow the chickens, instead contracting that job out to growers, were not "farmers" for purposes of the Capper-Volstead Act exemption from the antitrust laws for farm cooperatives.

Reversed.

1. **Monopolies Key 17(4)**

Even cooperatives which come within the protection of the Capper-Volstead Act do not thereby obtain complete antitrust immunity. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

2. **Statutes Key 188**

Words in statute should be given their ordinary, popular meaning unless Congress clearly meant the words to have some more technical meaning.

3. **Monopolies Key 17(4)**

Broiler integrator companies which had taken on more than one of the tasks necessary to bring broiler chickens to consumers but which had not performed the actual raising of the broiler chicks to maturity, instead allowing that activity to be handled by contract growers who were paid for growing the chickens, title to which remained in the broiler integrators, were not "farmers" for purposes of the Capper-Volstead Act exemption from the antitrust laws for farmers cooperatives. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

See publication Words and Phrases for other judicial constructions and definitions.

4. **Monopolies Key 17(4)**

As used in the Capper-Volstead Act, the term "farmer" still means what it meant in 1922, i.e., one who owns or operates a farm. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

5. **Monopolies Key 17(4)**

Purposes of the Capper-Volstead Act were to improve the bargaining position of farmers vis-a-vis corporate middlemen in order to increase farm income and to stop the rise of tenancy and the migration of farm families to the cities; Congress did not intend that benefits afforded to farmers by the Act be extended to include the corporate entities with which farmers dealt. Capper-Volstead Act, §§ 1, 2, 7 U.S.C.A. §§ 291, 292.

6. **Statutes Key 184**

When a court takes account of changed reality in interpreting statutes, the goal remains effectuation of congressional purpose, not alteration of it.

Appeal from the United States District Court for the Northern District of Georgia.

Before MORGAN and HILL, Circuit Judges, and NOEL,* District Judge.

LEWIS R. MORGAN, Circuit Judge:

We must decide whether broiler industry companies that neither own nor operate farms can be "farmers" within the meaning of a 1922 federal statute called the Capper-Volstead Act,[1] which gives farmers' cooperatives some measure of protection from the antitrust laws. The question is a novel one. After careful study of the Act and its legislative history, we are convinced that Congress's purpose in enacting Capper-

---

* Senior District Judge of the Southern District of Texas sitting by designation.

[1] 7 U.S.C. §§ 291-92.

Volstead does not mandate or permit protection of these broiler industry companies from the proscriptions of the antitrust laws. The district court held otherwise, and we reverse.

I. FACTS

A. *The Broiler Industry*

Broilers are young chickens that are slaughtered when seven-to-nine weeks old, then processed and offered for sale ready-to-cook. The broiler industry comprises generally two types of entities—integrator companies and contract growers. The defendant National Broiler Marketing Association (NBMA) is composed of integrator companies.

"Integrators" have that name because over the years they have accomplished what is called the vertical integration of much of the broiler industry. That is, they have taken on more than one of the tasks necessary to bring broilers to consumers. Thus, many NBMA members[2] own and operate not only processing plants, but also feed mills, hatcheries, and breeder flocks (for the production of broiler eggs). Still, most NBMA members are processors, and a few operate only processing plants.

The one major operation not generally performed by the integrator firms is the actual raising of the broiler chicks to maturity. This is handled by farmers called contract growers. These growers raise the chicks on their own farms in their own buildings. They provide their own labor and equipment. The growers also supply the water and electricity needed during the grow-out process, as well as the litter and fuel used in lining and heating the broiler houses. The day-to-day husbandry of the flocks is left to the growers.

---

[2] This also includes companies owned by NBMA members or companies commonly owned with NBMA members.

Title to the broiler chicks is retained by the broiler integrators during the grow-out process. The integrators also supply feed and veterinary services. The integrators decide the number and timing of chick placements and the age and size at which the birds will be marketed.

Generally, the growers are treated by the integrators as independent contractors. The contracts provide for a minimum and maximum payment per bird or per pound to the grower.[3]

B. *The Litigation*

The government brought a civil antitrust action[4] against NBMA, alleging that the Association's members and others had combined to fix broiler prices and to restrict broiler production in order to increase broiler prices. After a period of discovery, both parties moved for partial summary judgment on agreed facts. The issue was whether NBMA's members are farmers within the meaning of the Capper-Volstead Act, which states generally that "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" may engage in certain activities cooperatively.[5]

---

[3] The minimum payment provided in some contracts is less than the cost incurred by the average grower in raising a flock of broilers. Ordinarily, NBMA members are free to lower the payment scale under their contracts with growers before any new flock is grown in response to rising feed costs or falling market prices for broilers. Members are also free to reduce the number of broilers or flocks placed with growers in response to market conditions. Members are usually free to terminate their contracts with growers after any flock and in fact have done so for a variety of reasons.

[4] The action was brought under section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain alleged violations of section 1 of that Act, 15 U.S.C. § 1.

[5] The full text of the Act is as follows:

§ 291. Authorization of associations; powers

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers

may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such association may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

§ 292. *Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure*

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a

[1] The district court held that NBMA's members are farmers as the term is used in the Act and granted NBMA's motion for

certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction, or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

7 U.S.C. §§ 291-92.

Eight years prior to passage of the Capper-Volstead Act, Congress enacted section 6 of the Clayton Act, 15 U.S.C. § 17:

§ 17. *Antitrust laws not applicable to labor organizations*

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

This was the first Congressional action to protect cooperative endeavors from the antitrust laws. Capper-Volstead's effect was "to clarify the exemption for agricultural organizations and to extend it to cooperatives having capital stock." *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391, 88 S.Ct. 528, 532, 19 L.Ed.2d 621 (1967).

BEST COPY AVAILABLE

partial summary judgment.[6] Then the government, with NBMA's acquiescence, filed an amended complaint, deleting all of the allegations that survived the partial summary judgment.[7] The parties stipulated that the government would be allowed to bring a later action reviving those allegations.

The district court granted final judgment in favor of NBMA.[8] and the case is here on the government's appeal of the district court's final order.

II. DISCUSSION

We have noted already that the issue we must decide today is novel. In fact, the Capper-Volstead Act, since its enactment in 1922, has received little attention from the Supreme Court.[9]

---

[6] *United States v. National Broiler Marketing Ass'n*, 1975—2 CCH Trade Cases ¶ 60,509 (N.D.Ga. Aug. 26, 1975).

[7] Even cooperatives that come within the protection of Capper-Volstead do not thereby obtain complete antitrust immunity. *See Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960); *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

[8] *United States v. National Broiler Marketing Ass'n*, 1976—1 CCH Trade Cases ¶ 60,801 (N.D.Ga. Mar. 16, 1976).

[9] The Supreme Court's most recent decision interpreting Capper-Volstead is *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967), in which the Court held that the Sunkist cooperative could not qualify for the exemption because some of its members were packing houses that contracted with fruit growers to handle the growers' fruit for cost plus a fixed fee. 389 U.S. at 387, 88 S.Ct. 528. The Supreme Court in *Case-Swayne* emphasized that the legislative history of Capper-Volstead made clear Congress's purpose to limit the shelter of the Act to actual growers. *Id.* at 391-93, 88 S.Ct. 528. Thus, the Court concluded that "Congress did not intend to allow an organization with such nonproducer interests [*i.e.*, the packing houses] to avail itself of the Capper-Volstead exemption." *Id.* at 395-96, 88 S.Ct. at 535.

The instant case is a logical successor to *Case-Swayne*. In *Case-Swayne*, the Supreme Court had little difficulty concluding that the packing houses were not farmers. Here, entities somewhat analogous to the packing houses, broiler integrators, assert that they are farmers for the reasons stated in the text *infra*.

Moreover, no significant body of Capper-Volstead law has developed in the lower federal courts.[10] And the legal commentary has not been abundant.[11]

The remaining Supreme Court decisions about Capper-Volstead are *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962) (several cooperatives may join together as one organization without losing Capper-Volstead protection); *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960) (Capper-Volstead not a license for farmers' cooperatives to engage in predatory practices otherwise violative of section 2 of Sherman Act); and *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939) (cooperative's combination with nonproducers not protected by Capper-Volstead; Capper-Volstead section 2 not exclusive remedy for cooperatives's anti-competitive conduct).

See also Tigner v. Texas, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124 (1940) (state antitrust law that exempts agriculture enterprises does not violate federal Constitution); *Frost v. Corporation Commission*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929) (Brandeis, J., dissenting) (discussion of cooperative movement); *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Ass'n*, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473 (1928) (statute making illegal the witting interference with contract between farmer and cooperative not violative of federal Constitution).

[10] The court of appeals and district court decisions treating Capper-Volstead either reached the Supreme Court, *see* note 9 *supra*, or are fairly routine applications of the principles announced in the Supreme Court opinions, *e. g.*, *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976) (applying *Borden* and *Maryland & Virginia Milk Producers*); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999, 95 S.Ct. 314, 42 L.Ed.2d 273 (1974) (potato marketing associations' activities qualified as marketing within the meaning of CapperVolstead); *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) (applying *Maryland & Virginia Milk Producers*); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F.Supp. 984 (N.D.Cal. 1976) (Capper-Volstead protects price-fixing by cooperative even when not incident to other collective activity); *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 355 F. Supp. 408 (D.C.Cal. 1971) (restructured Sunkist comes within Capper-Volstead).

[11] *See generally, e. g.*, J. von Kalinowski, 16F Business Organizations (Antitrust Laws & Trade Regulation) §§ 51.01 to -.06 (1976); Hanna, *Antitrust Immunities of Cooperative Associations*, 13 Law &

The positions of the parties may be stated briefly. The government contends that Congress clearly meant to limit the benefits of the Capper-Volstead Act to persons that own or operate farms. The government argues that this interpretation comports with the ordinary meaning of the word "farmers" and with the central themes of the legislative history of the Act. The record reflects and NBMA concedes that some of its members neither own nor operate any farms on which broilers are raised to maturity.

NBMA counters that "farmers" ought to be read "in a realistically broad sense."[12] Deemphasizing "farmers," but clearly aware that the term "farmers" is the slipper that must fit the foot, NBMA argues that Congress intended to afford Capper-Volstead's protection "to all persons actually engaged in the production of agricultural products."[13] NBMA urges that its members are so engaged principally because they own the chicks, furnish the feed, and share in the risks that attend broiler production.

Contemp. Prob. 488 (1948); Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 Admin.L.Rev. 455 (1969-70); *Lemon, The Capper-Volstead Act—Will It Ever Grow Up*, 22 Admin.L.Rev. 433 (1969-70); Mahaffie, *Cooperative Exemptions Under the Antitrust Laws: A Prosecutor's View*, 22 Admin.L.Rev. — (1969-70); Mischler, *Agricultural Cooperative Law*, 30 Rocky Mtn.L.Rev. 381 (1958); Noakes, *Exemption for Cooperatives*, 19 ABA Antitrust Section 407 (1961); Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA Antitrust Section 313 (1961); Saunders, *The Status of Agricultural Cooperatives Under the Anti-Trust Laws*, 20 Fed.B.J. 35 (1960).

[12] Brief for NBMA at 42. *But see Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967). In Case-Swayne, the Supreme Court characterized Capper-Volstead as constituting "special exceptions to a general legislative plan," *id.* at 393, 88 S.Ct. at 533 and further spoke of the Act as a "limited" exemption, *id.* at 391 n. 8, 88 S.Ct. 528.

[13] Brief for NBMA at 22.

Neither of the interpretations seems on its face wholly irrational. Our task is to decide which of the two is the more congenial to the language and purpose of Capper-Volstead.

A. *The Words Congress Used*

We begin with the words of the statute.[14] Congress granted a measure of protection from the antitrust laws to "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . .". NBMA focuses on the first part of the clause—persons engaged in the production of agricultural products—as the key to the Act's coverage. It seems clear, however, that the universe of persons engaged in the production of agricultural products can be larger than the universe of those so engaged as farmers, planters, ranchmen, dairymen, nut or fruit growers.[15] The test, then, is whether broiler integrator firms are *farmers*.

---

[14] *Dupuy v. Dupuy*, 511 F.2d 641, 642 (5th Cir. 1975).

[15] The legislative history of Capper-Volstead, discussed *infra*, shows a genuine Congressional concern that the statute not be as broad as a liberal construction of "production" might allow. In *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967), the Supreme Court noted this concern, quoting from a floor debate exchange involving Senator Kellogg, a principal sponsor of the measure:

> "Mr. CUMMINS . . . . Are the words 'as farms, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?
>
> "Mr. KELLOGG. I think they are descriptive of the general subject. I think 'farmers' would have covered them all.
>
> "Mr. CUMMINS. I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend

[2] What meaning are we to place on the word "farmers"? It is long settled that words in statutes should be given their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense.[16] Mr. Justice Frankfurter stated the point well:

> [L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944). Of course we cannot take a poll to determine the ordinary, popular meaning of the word "farmers." And our confidence in the dictionary for this purpose is not great.[17] We are left to our judgment, informed by the whole of our experience.

---

by this bill to confer upon them the privileges which the bill grants, I assume?

"Mr. KELLOGG. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.

"Mr. TOWNSEND. They must be persons who produce these things.

"Mr. KELLOGG. Yes; that has always been the understanding."

389 U.S. at 392, 88 S.Ct. at 533, *quoting* 62 Cong.Rec. 2052 (1922).

[16] *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968); *Malat v. Riddell*, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966).

[17] The relevant definitions of the word "farmer" in *Webster's Third New International Dictionary* (1964) include "a person who cultivates land or crops or raises livestock," "one that rents or leases land for cultivation," and "a person whose primary occupation is the raising of crops or livestock." *Id.* at 824.

[3] We cannot conceive that the ordinary, popular sense of the word "farmers" would fit broiler integrator companies. The husbandry of the broiler flocks is carried out neither by these firms nor by their employees, but by the contract growers. The farms where the husbandry is done are owned not by NBMA members or their employees, but by these growers. Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership. Given the absence of both of these elements here, none of the factors suggested by NBMA as indicative of farming nor all of the factors together would seem a sufficient shoe horn to squeeze these companies into farmers' boots. Asked to examine the broiler business and to identify the "farmers," Justice Frankfurter's common run of men, we think, would point to the contract growers —the persons who own and operate the farms—as the "farmers."

[4] NBMA cautions us against a romantic view of agriculture and points out that agriculture has changed greatly from the Jeffersonian conception of the self-sufficient yeoman. We agree that agriculture has changed much. But the ordinary, popular meaning of the word "farmer" has not. When the common run of people wish to speak of the broader spectrum of modern agriculture, the word generally used is "agribusiness." "Farmer" still means what it meant in 1922—one who owns or operates a farm.

Mr. Justice Holmes observed once that "the meaning of a sentence is to be felt rather than to be proved . . .". *United States v. Johnson*, 221 U.S. 488, 496, 31 S.Ct. 627, 55 L.Ed. 823 (1911). We believe the Capper-Volstead Act, with its listing of beneficiaries—farmers, planters, ranchmen, dairymen, nut or fruit growers—has a feeling, a cadence of meaning, that has no place for NBMA's member companies.

B. *The Legislative History*

Our examination of the legislative history of Capper-Volstead has only reinforced our conviction that Congress meant "farmers" to be read in its ordinary sense, as urged by the government, rather than in an imaginative, broad sense, as urged by NBMA.

[5] The Act's legislative history carries two dominant themes. Congress meant to improve the bargaining position of farmers vis-a-vis corporate middlemen in order to increase farm income and, importantly, to stop the rise of tenancy and the migration of farm families to the cities. Second, Congress was convinced that the benefits afforded to farmers by Capper-Volstead should not be extended to include the corporate entities with which farmers dealt.

The Congressional concern for the weak bargaining position of the individual farmer was emphasized in the House Report:

> Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price he is threatened with prosecution.[18]

This point was reiterated in the upper chamber's debates. Senator Kellogg, the floor manager of the legislation, spoke of the farmer as "a small holder of land" whose "means and . . . opportunities are not sufficient to allow him to take any steps whatever in placing his products with the ultimate consumer or, usually, with the middleman."[19] Thus, Congress's purpose in enacting Capper-Volstead was, as Mr. Justice Black observed, to give "individual farmers . . . through agricultural cooperatives

[18] H.R.Rep.No.24, 67th Cong., 1st Sess. 2 (1921).

[19] 62 Cong.Rec. 2050 (1922).

acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." *Maryland & Virginia Milk Producers Association v. United States*, 362 U.S. 458, 466, 80 S.Ct. 847, 853, 4 L.Ed.2d 880 (1969).

NBMA suggests that the purpose of Capper-Volstead was to make farming reliably profitable and to assure the nation a stable supply of wholesome food. This characterization is incomplete and therefore misleading. Congress meant to make farming reliably profitable in order to insure the occupational survival of small scale agriculturalists who were "widely scattered and inured to habits of individualism . . .".[20] By 1922 farming's unprofitability had sent thousands of farmers to the cities to find work.[21] Congress feared that the system of small, individually owned farms would be unable to survive. Senator Kellogg stated this apprehension during the floor debates: "In my opinion, the greatest concern confronting the statesmen of the country is the tendency to drift to the cities, the decline of agriculture, the increase of landlordism and tenancy."[22] Senator Capper reiterated the point:

[20] The quoted language is from *Tigner v. Texas*, 310 U.S. 141, 145, 60 S.Ct. 879, 881, 84 L.Ed. 1124 (1940) (Frankfurter, J.).

[21] *See* 62 Cong.Rec. 2218 (1922) (remarks of Sen. Calder).

[22] 62 Cong.Rec. 2051 (1922).

In the 1955 report of the Attorney General's National Committee to Study the Antitrust Laws, the chief reasons for protection of certain agricultural activities from the antitrust laws were listed. First among these was "preservation of the family farm as the primary unit of agricultural production." The report also listed assurance of an adequate supply of agricultural products and "the need for offsetting the weakness of the individual farmer faced with greater bargaining power in the markets where he buys and sells." J. von Kalinowski, 16F Business Organizations (Antitrust Laws and Trade Regulation § 51.01[1], at 51-3 n. 3 (1976)), *quoting* Att'y Gen. Rep. 306 (1955).

> During the last decade of the 19th century and the early decades of the 20th, mortgage indebtedness rose sharply, and

> Mr. President, every statesman looks forward to a condition as ideal when the whole country will be dotted with small farms, each operated by its owner. Every statesman deplores the spread of tenantry and insists that best citizenship can be developed only upon the individual system of farm production. Because of his peculiar characteristic of agriculture, the growers have never been able to adopt a corporate form of organization; they have, therefore, gradually fitted into the cooperative form of organization, which maintains individuality of production but enables them to unite for marketing purposes.[23]

Cooperation among farmers thus was seen as the best solution to the farmers problems because it allowed them to band together without sacrificing their social and economic individualism. The House Report, for example, rejected the corporate mechanism as the farmers' redemption:

> It is no answer that farmers may acquire the status and secure the rights of a business corporation by deeding their farms to a corporation. That is neither practical nor desirable from any standpoint.[24]

Senator Kellogg agreed:

---

there was a dramatic growth in the amount of farm tenancy in the country. By the end of the 1920s, a large percentage of the nation's farmers no longer owned the land they worked. Tenancy rates were exceptionally high in the specialized cash-crop areas of the country. In the eastern and western Cotton Belts, over two-thirds of all farmers were tenants, and in the wheat and corn belts, approximately two-fifths farmed land they did not own.

Conrat & Conrat, How U.S. Farmers Became Specialists—in Cash and Debts, *Smithsonian* 54 (Mar. 1977).

[23] 62 Cong.Rec. 2058 (1922).

[24] H.R.Rep.No.24, 67th Cong., 1st Sess. 2 (1921).

> Mr. President, of course, the farmer can not consolidate his land into great holdings or into corporate ownership, and he should not do so. The hope of this Nation, the hope of any nation, the hope of the independence and the prosperity of our people, our very civilization, depends upon the individual ownership and proprietorship of the soil.[25]

A corollary to Congress's purpose to strengthen the position of farmers vis-a-vis middlemen was Congress's resolve to leave fully subject to the antitrust laws those companies with which farmers dealt. For example, the Senate rejected[26] an amendment[27] proposed by Senator Phipps that would have extended the shelter of Capper-Volstead to companies such as sugar refineries that entered into pre-planting contracts with farmers. Senator Phipps's proposal generated this exchange on the floor:

> Mr. KELLOGG. Mr. President, I hope this amendment will not be adopted. It permits any manufacturer who converts a product into a finished commodity where the price paid by the manufacturer to the producer is controlled by or dependent upon the price received by the manufacturer for the finished product to enter into any combination he sees fit. *Of course, if they make contracts with the producers of the raw materials, the packers, the sugar manu-*

---

[25] 62 Cong.Rec. 2051 (1922).

[26] 62 Cong.Rec. 2275 (1922).

[27] The amendment would have inserted the following language after "nut or fruit growers":

> and where any such agricultural product or products must be submitted to a manufacturing process, in order to convert it or them into a finished commodity, and the price paid by the manufacturer to the producer thereof is controlled by or dependent upon the price received by the manufacturer for the finished commodity by contract entered into before the production of such agricultural product or products, then any such manufacturers may.

62 Cong.Rec. 2273 (1922).

facturers, or anybody manufacturing anything where the raw product is produced on the farms can combine under this bill.

If the Senate wishes absolutely to defeat the bill, it ought to adopt this amendment; otherwise not.

Mr. PHIPPS. Mr. President, will the Senator yield?

Mr. KELLOGG. I yield.

Mr. PHIPPS. I desire to call attention to the fact that this amendment is limited to cases where the manufacturer enters into a contract with the producer before the produce has been grown.

Mr. KELLOGG. I can answer that. That is perfectly easy to do. *The packers could enter into contracts, the cotton mills could enter into contracts; and I hope the Senate will defeat the amendment.*[28]

Although we concede that there are differences between the contractual arrangement prevalent in the broiler industry and the arrangements that would have been covered by the Phipps Amendment, we are convinced that the nature of the opposition to that Amendment is instructive here as evidence that the Capper-Volstead Congress would not have considered NBMA integrators "farmers," but instead would have grouped them with the packers, the cotton mills, and the sugar refineries.

Congress's determination to circumscribe carefully the coverage of the Act is reflected in other parts of the legislative history as well. For example, the House Report stated:

> Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed

[28] 62 Cong.Rec. 2274 (1922) (emphasis added).

> to exclude from the benefits of this legislation all but actual farmers . . .[29].

Reading "farmers" in its ordinary sense as meaning those who own or operate farms focuses the benefits of the Act more closely on the persons central to Congress's concern and it keeps subject to the antitrust laws those companies that prepare farm products for market.

C. *The Fabric of Other Law*

The language and legislative history of Capper-Volstead support the government's position. NBMA contends, however, that the government's reading of "farmers" is at odds with the treatment of broiler integrators and similar entities under other statutes and regulations.[30] The contention is unavailing. First, broiler integrators and like companies have not fared nearly so well under other statutory schemes as the NBMA contention suggests.[31] Second, none of the other statutes or regulations

[29] H.R.Rep.No.24, 67th Cong., 1st Sess. 1 (1921). And see note 15 *supra*.

[30] Representative of the decisions cited by NBMA are *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969) (Fair Labor Standards Act); *United States v. Chemell*, 243 F.2d 944 (5th Cir. 1957) (Treasury Regulations); and *Agricultural Transport Ass'n v. United States*, 274 F.Supp. 528 (N.D.Tex.1967) (Interstate Commerce Act). NBMA also mentions a decision of the New Orleans Bank for Cooperatives to extend credit, Brief for NBMA at 47; a decision of the Secretary of Agriculture regarding a turkey marketing order, 27 Fed.Reg. 3326-54 (1962); a Cost of Living Council Decision, Brief for NBMA at 50; and a recent state court decision in Maine, *Maine Agricultural Marketing Ass'n v. Maplewood Poultry Co.*, Civ.No. 559 (Super.Ct.Me., Kennebec SS. 1971).

[31] In addition to the Fair Labor Standards Act decisions cited in the text, *infra*, *see, e.g., Parks v. Federal Crop Ins. Corp.*, 416 F. 2d 833 (7th Cir. 1969); *United States v. Elm Spring Farm, Inc.*, 38 F.Supp. 508 (D.Mass. 1941), *modified on other grounds*, 127 F.2d 920 (1st Cir. 1942).

mentioned by NBMA involves the important national commitment to free competition embodied in the antitrust laws.[32] We are wary of transplanting results from one statutory scheme to another, because policies may vary, and even where policies seem the same, different countervailing interests may affect the extent to which Congress intends to effectuate the policies.[33]

NBMA relies heavily on results under the Fair Labor Standards Act (FLSA)[34] and stresses particularly a panel decision of this court, *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969). In *Strain*, we held that a broiler integrator was a raiser of poultry within the meaning of the agricultural exemption in the FLSA.[35] The *Strain* decision is no longer good law. In *Bayside Enterprises, Inc. v. NLRB*, — U.S. —, 97 S.Ct. 576, 50 L.Ed.2d 494 (1977), the Supreme Court held that the National Labor Relations Board's position on the issue must be sustained. The NLRB squarely and consistently has held:

> when an employer contracts with independent growers for the care and feeding of the employer's chicks, the em-

[32] *See e. g., Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967).

[33] *See United States v. Sisson*, 399 U.S. 267, 297-98, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970); *United States v. Stewart*, 311 U.S. 60, 69, 61 S.Ct. 102, 85 L.Ed. 40 (1940); *Lane v. Railroad Retirement Bd.*, 185 F.2d 819, 822 (6th Cir. 1950). In *FTC v. Bunte Bros.*, 312 U.S. 349, 61 S.Ct. 580, 85 L.Ed. 881 (1941), the Court stated:

> Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system.

Id. at 353, 61 S.Ct. at 582.

[34] 29 U.S.C. § 201 *et seq.*

[35] 29 U.S.C. § 203(f).

> ployer's status as a farmer engaged in raising poultry ends with respect to those chicks.

Imco Poultry, Division of International Multifoods Corp., 202 N.L.R.B. 259, 260 (1973). Thus, the government's interpretation of Capper-Volstead is consistent with the treatment accorded broiler integrators by the NLRB.

The Secretary of Labor long has held that employees of broiler integrators are not agricultural employees within the meaning of FLSA. A Labor Department regulation states:

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not 'raising of poultry' and employees engaged in them cannot be considered agricultural employees on that ground.[36]

We note these results under the labor laws because they show at least that the government's position is no aberration. To be sure, integrators have had some success in pressing their claim to be farmers.[37] It is sufficient answer that we find nothing in these results under different schemes that compels an interpretation of Capper-Volstead that is contrary to the interpretation suggested by the language and legislative history of the Act. Blind obeisance to consistency is no virtue if it takes us from our pri-

[36] 29 C.F.R. § 780.126.

[37] *See* note 30 *supra*.

mary duty to work the will of the elected representatives of the people, and such obeisance would be strange indeed here, as there is no real consistency to obey.

III. CONCLUSION

NBMA's position that the Capper-Volstead Act should be brought up to date to take account of the complex structure of modern agriculture[38] rests on fundamental misconceptions of the Congressional purpose revealed in the language and legislative history of the Act and of the role of the judiciary in a democratic society.

The language and legislative history of Capper-Volstead make quite clear that Congress had no purpose to shelter from the laws of free competition the whole spectrum of agricultural enterprise. We may be certain that even in 1922 the agricultural economy had begun to evolve into the intricate thing it now is, yet Congress carefully limited the benefits of the Act to "farmers," and the legislative history reinforces our inclination to give the word its ordinary meaning.

[6] When a court takes account of changed reality in interpreting statutes, the goal remains effectuation of Congressional purpose, not alteration of it. If there are good reasons why broiler integrators should be protected against the general national policy of free competition, then NBMA should present those reasons to Congress.[39]

REVERSED

---

[38] Brief for NBMA at 26, 31.

[39] Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive.

Addision v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617, 64 S.Ct. 1215, 1221, 88 L.Ed. 1488 (1944).

United States Court of Appeals
For the Fifth Circuit

No. 76-2115

D. C. Docket No. CA18173

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

NATIONAL BROILER ASSOCIATION,
Defendant-Appellee.

Appeal from the United States District Court for the
NORTHERN DISTRICT OF GEORGIA

Before MORGAN and HILL, Circuit Judges, and NOEL,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 22, 1977

Issued as Mandate:

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume II

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 21, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

TABLE OF CONTENTS

Volume I

	Page
Relevant Docket Entries	1
United States District Court for the Northern District of Georgia, Civil Docket	1
United States Court of Appeals for the Fifth Circuit, Filings	4
Statement of Material Facts Not in Dispute	5
Government's Statement of Material Facts	21
Errata	30
Stipulation of April 29, 1975	35
Stipulation of June 6, 1975	60
Order of August 26, 1975	81
Stipulation of February 26, 1976	91
Order of February 26, 1976	92
Amended Complaint	92
Answer to Amended Complaint	97
Order of March 16, 1976	105
Final Judgment of March 16, 1976	109
Opinion of the United States Court of Appeals, Fifth Circuit, April 22, 1977	111
Judgment of the United States Court of Appeals, Fifth Circuit, April 22, 1977	133

Volume II

Affidavit of Bob M. Anthony 135

Affidavit of Irston R. Barnes 168

Affidavit of Ford Barrett 232

Affidavit of J. Troy Copeland 238

Affidavit of Kirk H. Davis 244

Affidavit of Dr. Verner G. Hurt 250

Affidavit of Richard C. Larkin 261

Affidavit of Maurice B. Layton 274

Affidavit of Albert B. Maddox 280

Affidavit of James Archie Martin 286

Affidavit of Leroy Emerson Mayfield 292

Affidavit of H. F. McCarty, Jr. 301

Affidavit of William T. O'Neal 314

Affidavit of A. C. Smith 321

Affidavit of Thomas W. Sparks 334

Affidavit of Collier Wenderoth 342

Affidavit of Ronald M. Cameron 344

Plaintiff's Objections to the Admissibility of Affidavits Submitted by NBMA in Support of Its Motion for Partial Summary Judgment 347

VOLUME II

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF BOB M. ANTHONY

(Filed May 1, 1975)

State of Mississippi
County of Hinds

I. Bob M. Anthony, after first being duly sworn, on oath, depose and say:

1

I make this affidavit for use by National Broiler Marketing Association (hereinafter sometimes referred to as "NBMA" or "the Association") in support of its Motion for Summary Judgment in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is 405 Forest Avenue, Jackson, Mississippi 39206, and my business address is 5420 I-55 North, Jackson, Mississippi 39206.

4

I am general manager of NBMA and I have served in that capacity since the Association was chartered in 1970.

5

As general manager, I am responsible for and have charge of the ordinary and usual day-to-day business operations and affairs of NBMA.

6

NBMA was organized and chartered by the State of Georgia on September 15, 1970, as a non-profit cooperative association of persons engaged in the production of agricultural products pursuant to the provisions of the Georgia Cooperative Marketing Act, Georgia Code, Ann. §§65-201 et seq.

7

A certified copy of the Articles of Incorporation of National Broiler Marketing Association is attached hereto and incorporated herein as Exhibit "A".

8

A certified copy of the By-Laws of National Broiler Marketing Association, as amended, is attached hereto and incorporated herein as Exhibit "B".

9

NBMA was originally organized and chartered as a cooperative association with capital stock. On December 6, 1973, the Articles of Incorporation were amended to authorize cancellation of the association's capital stock and conversion of the association to a non-profit membership cooperative association not having capital stock.

10

A certified copy of the Articles of Amendment approved December 6, 1973 together with the Judge's Order thereon, the filing of the Clerk and the certificate of the Secretary of State was filed of record in this action on January 4, 1974,

annexed as Exhibit "B" to the affidavit of Paul J. Morgan in support of a motion made by defendant NBMA to amend its answer.

11

NBMA has been operated at all times for mutual benefit of its members as producers of broilers.

12

No member of the association has been allowed more than one vote at any time.

13

The association has at no time paid dividends on stock or membership capital in excess of 8 percent per annum.

14

The association has not dealt in the products of non-members to an amount greater in value than such as have been handled by it for members.

15

The Association has been conducted at all times on a non-profit cooperative basis.

16

NBMA serves its members through cooperative marketing and cooperative purchasing activities on behalf of its members as producers of broilers.

17

NBMA has engaged in cooperative purchasing activities on behalf of its members including purchases of fish meal and other broiler feed ingredients; development and purchase of plastic coops designed for use in moving the members' live broiler chick-

ens to the processing plant; development and purchase of plastic feeder lids for use in feeding members' broiler and breeder chicks during the first several days of the growout period; development and purchase of plastic pallets used for shipping members' ready-to-cook (dressed) broilers to customers; purchases of poly bags, boxes and other items used for packaging ready-to-cook broilers and parts, and purchases and development of other goods and services used by the members in producing and marketing broilers.

18

Purchasing activities undertaken by NBMA for the mutual benefit of its member producers have accounted for $23,308,-704.00 in total volume over the past three years.

19

NBMA also performs substantial marketing functions for its member producers, including negotiating and handling large and small volume sales of broilers for export shipment both with and without the NBMA brand name and label. NBMA takes title to all product which it handles in export sales.

20

Other marketing activities of NBMA have included the operation of a foreign trade sales program in foreign markets to handle overseas promotion, exhibits, sales, contracts, negotiations, shipping arrangements and distribution; development of specifications, packaging, and other techniques and services in connection with export marketing by NBMA and its members; operation of a domestic sales promotion program, including attendance and exhibition at trade shows for buyers and potential buyers and merchandisers of broilers and broiler products; and the collection and dissemination to members of extensive market information.

21

NBMA's marketing activities also include market research, production planning research, and continuing market information programs which involve the acquiring, exchange, interpretation, and dissemination of past, present, and prospective crop, market, statistical, economic and other similar information relevant to the broiler production and marketing of NBMA's members.

22

Many details of NBMA's marketing activities are set out on pages 27 through 29 of Defendant's Answers to Plaintiff's Second Interrogatories filed in this action over my signature and under oath on March 7, 1975.

23

The members of NBMA are integrated producers of broilers.

24

Integrated producers of broilers are firms (including cooperatives) which own broilers and control their production through all production stages. The stages of broiler production include maintenance of a hatchery supply flock to produce broiler chick eggs for hatching; operation of a hatchery for hatching broiler chicks; raising the broiler chicks to an age of 7 to 9 weeks, including formulation and supply of the feed, medicines, vaccines, and other supplies essential to the growth and quality of the broilers; processing of the live birds into ready-to-cook broilers; and marketing of ready-to-cook broilers.

25

All NBMA members own and control the production of their broilers throughout the growout phase, although the growout is nearly always accomplished through contractual arrangements with independent contractors, known as growers, who provide

facilities and services necessary to care for the chickens during the growout period as determined by the integrators who are NBMA members.

26

Federal programs conducted by the U.S. Department of Agriculture, including programs to prevent and control surpluses and ensure orderly marketing of broilers, such as publication of Broiler Marketing Guides, broiler situation reports, and other supply and demand data, have been designed for assistance to, and implementation by, integrated broiler producers.

27

As general manager of NBMA, a cooperative association of integrated broiler producers, I have often been called upon by federal and state agencies for advice and consultation with respect to broiler production and marketing conditions and problems, including attendance at several meetings conducted by the U.S. Department of Agriculture in the process of formulating its Broiler Marketing Guides. To the best of my knowledge, such meetings were always attended by NBMA members and other integrated producers, and not by persons performing only contract growing functions.

28

On March 31, 1975, National Broiler Marketing Association was notified by the New Orleans Bank for Cooperatives that the Farm Credit Administration had approved the eligibility of National Broiler Marketing Association to borrow from the New Orleans Bank for Cooperatives. This notification came after NBMA had provided to the New Orleans Bank for Cooperatives extensive information under oath, relating to the producer qualifications of all of its members. Although National Broiler Marketing Association has not at this time requested a loan from the New Orleans Bank for Cooperatives, the eligibility of the Association to do so is now clear.

29

I have been involved in the production of broilers since approximately 1960, and I have always considered an integrated entity owning the chickens and responsible for management of the production of broilers to be a producer of broilers, and the principal risk-bearer in the production and marketing of broilers.

This 25th day of April, 1975.

/s/ BOB M. ANTHONY

Sworn to and subscribed
before me this 25th day
of April, 1975

Carolyn W. Hust
Notary Public

My Commission Expires May 6, 1976

Exhibit A

STATE OF GEORGIA

(Seal)

Office of Secretary of State

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify that the twelve pages of photographed printed matter hereto attached is a true and correct copy of the original articles of incorporation, the Judge's order thereon, the filing of the Clerk and certificate of the Secretary of State for "NATIONAL BROILER MARKETING ASSOCIATION", as the same appears of file and record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of office, at the Capitol, in the City of Atlanta, this 23rd day of April in the year of our Lord One Thousand Nine Hundred and Seventy Five and of the Independence of the United States of America the One Hundred and Ninety-Ninth

/s/ Ben W. Fortson, Jr.
Secretary of State, Ex-Officio Corporation
Commissioner of the State of Georgia.

(Seal)

Duplicate

STATE OF GEORGIA

(Seal)

Office of Secretary of State

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify, that

"National Broiler Marketing Association"

was on the 15th day of September, 1970, duly incorporated under the laws of the State of Georgia by the Superior Court of DeKalb County for a perice of Fifty years from said date, in accordance with the certified copy hereto attached, and that the original articles of incorporation of said corporation has been duly filed in the office of the Secretary of State and the fees therefor paid, provided by law.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of office, at the Capitol, in the City of Atlanta, this 15th day of September, in the year of our Lord One Thousand Nine Hundred and Seventy and of the Independence of

the United States of America the One Hundred and Ninety-Fifth.

BEN W. FORTSON, JR.
Secretary of State, Ex-Officio Corporation
Commissioner of the State of Georgia

ARTICLES OF INCORPORATION
OF
NATIONAL BROILER MARKETING ASSOCIATION

We, the undersigned, all of whom are engaged in the production of agricultural products, do hereby voluntarily associate ourselves together for the purpose of forming a cooperative association, with capital stock, under the provisions of the Cooperative Marketing Act of the State of Georgia, being Sections 65-201 through 65-231 of the Code of Georgia, and we hereby petition the Superior Court of DeKalb County, Georgia for Articles of Incorporation, as follows:

Article I
Name

The name of the association shall be National Broiler Marketing Association.

Article II
Purposes

The purposes for which the association is organized are:

(a) To engage in any activity involving or relating to the buying, receiving, grading, processing, packaging, storing, financing, preserving, shipping, handling, marketing, selling and distributing agricultural products produced by its members, and with respect to the buying, handling, manufacturing or selling of supplies, equipment and machinery necessary or incidental to the production of agricultural products;

provided, however, the association shall not deal in the agricultural products of non-members in an amount greater in value than that handled for members; nor shall the association handle or sell to non-members supplies, equipment or machinery in an amount greater than that sold or furnished by it to members; and the term "agricultural products" as used herein shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee and any farm products.

(b) To promote, encourage, foster and facilitate the economic, orderly and efficient production, distribution and sale of agricultural products; to engage in and carry on programs of research and development relating to the improvement in methods of production, processing, packaging, preserving, storing, marketing and distributing such products and to engage in and carry on programs to promote the public acceptance and use of such products.

(c) To borrow money without limitation as to amount and to give any kind or form of obligation or security therefor, and to make advances to its members and other producers.

(d) To purchase or otherwise acquire, and to hold, own and exercise all rights of ownership in, and to sell, transfer or pledge shares of the capital stock or bonds of any corporation or association engaged in any activity related to the production or handling of agricultural products.

(e) To buy, lease, hold and exercise all privileges of ownership over such real and personal property as may be necessary or convenient for the conduct and operation of the business of the association or incidental thereto.

(f) To draw, make, accept, endorse, guarantee, execute and issue promissory notes, bills of exchange, drafts, warrants, certificates, and all kinds of obligations and negotiable or transferable instruments of any kind that is deemed necessary to further the objects for which this association

is formed and to give a lien on any of its property as security therefor.

(g) To establish, secure, own and develop patents, trademarks and copyrights connected with or incidental to the business of the association.

(h) To cooperate with its members in conducting educational work concerning the value of cooperative marketing and to cooperate with its members and with state and federal agencies in acquiring, exchanging, interpreting and disseminating past, present and prospective crop, market, statistical, economic and other similar information concerning or relating to the supply of and demand for agricultural products.

(i) To cooperate with other similar associations and corporations in creating regional or national cooperative agencies for any of the purposes for which this association is formed and to become a member or stockholder of such agencies as are now or hereafter may be formed.

(j) To act as the agent and representative of its members in the performance of any of the activities mentioned in these Articles of Incorporation.

(k) To establish lawful reserves and to invest the funds thereof in bonds or in such other property as may be provided for in the by-laws.

(l) To have and exercise, in addition to the foregoing, all powers, privileges and rights conferred on ordinary corporations and cooperative associations by the laws of the State of Georgia and all powers and rights incidental or conducive to carrying out the purposes for which this association is formed, except such rights and powers as are inconsistent with the express provisions of the Act under which this association is incorporated and to do any such thing anywhere; and the enumeration of the foregoing

powers shall not be held to limit or restrict in any manner the general powers which may by law be possessed by this association, all of which are hereby expressly claimed.

Article III

Place of Business

The association shall have its principal place of business in the City of Atlanta, DeKalb County, Georgia.

Article IV

Period of Existence

The term for which this association shall exist is fifty (50) years from and after the date of its incorporation.

Article V

Directors

The number of directors of the association shall be not less than five and not more than the number fixed by the by-laws of the association. The names and addresses of those who are to serve as incorporating directors and until the first meeting of the members of the association or until their successors are elected and qualified are:

Name	Address
A. C. Smith	P. O. Box 226 Cumming, Georgia 30130
Maynard Sylvest	P. O. Box 2754 Montgomery, Alabama 36105
Lonnie A. Pilgram	P. O. Box 622 Pittsburg, Texas 75686
Paul J. Morgan	Robbins North Carolina
Marshal Durbin	2320 Second Avenue, South Birmingham, Alabama 35233

Article VI

Capital Stock

Section 1: The Capital stock of the association shall consist of not less than ten nor more than one thousand shares of common stock of the par value of $100.00 per share. The association shall also have the right to issue preferred stock from time to time having a par value of $100.00 per share, but there shall not be outstanding at any time more than 5,000 shares of preferred stock.

Section 2: The holders of the common stock of this association shall be the members of the association. The common stock of this association may be purchased, owned or held only by producers of agricultural products and cooperative associations of such producers, who shall patronize the association in accordance with uniform terms and conditions prescribed thereby, and only such persons shall be regarded as eligible members of the association. In the event the Board of Directors of the association shall find, following a hearing, that any of the common stock of this association has come into the hands of any person who is not an eligible member, or that the holder thereof has ceased to be an eligible member, such person shall have no rights or privileges on account of such stock or vote or voice in the management of the affairs of the association (other than the right to participate in accordance with law in case of dissolution and to receive the par value or book value of such stock, whichever is less, in the event of its sale, transfer or conversion as herein provided). The association, upon such a finding, shall have the right, at its option, (a) to purchase such common stock at its book or par value, whichever is less, as determined by the Board of Directors of the association; (b) to require the transfer of such stock at such book or par value to any person eligible to hold it; or (c) to require such holder of such stock to convert it into shares of preferred stock of equal par value. In exercising its right to purchase or to require the transfer or

conversion of such common stock, the association may, if the holder thereof fails to deliver the certificate evidencing the stock, cancel such certificate on its books and issue a new certificate of common or preferred stock, as the case may be, to the person entitled thereto.

The common stock of this association may be transferred only with the consent of the Board of Directors of the association and on the books of the association, and then only to persons eligible to hold it; and no purported assignment or transfer of common stock shall pass to any person not eligible to hold it, any of the rights or privileges on account of such stock or vote or voice in the management of the affairs of the association. Each eligible holder of common stock shall be entitled to only one vote in any meeting of the stockholders, regardless of the number of shares of stock owned by such person. Non-cumulative dividends of not to exceed 6% per annum may be paid upon the common stock, when funds are available therefor, if, as and when dividends are declared by the Board of Directors; provided, however, no dividends shall be payable to owners of common stock unless and until dividends have first been paid to the owners and holders of the preferred stock of the association. This association shall have a lien on all of its issued common stock for all indebtednesses of the holders thereof to the association.

Section 3: The preferred stock of this association shall be issued in annual series, may be held by anyone but shall carry no voting rights and may be transferred only on the books of the association. Non-cumulative dividends of 8% per annum may be paid on preferred stock if, as and when declared by the Board of Directors of the association. The preferred stock may be redeemed by series in whole or in part on a pro rata basis at par, plus any dividends declared thereon and unpaid, at any time upon thirty days notice by the association, provided said stock is redeemed in the same order as originally issued by years. On the failure of the holder or holders to deliver the certificate

or certificates evidencing any such redeemed stock, the association may cancel the same on its books. Stock which has been redeemed may, in the discretion of the Board of Directors, be re-issued or retired. All such preferred stock so redeemed shall be paid for in cash at the par value thereof, plus any dividends declared thereon and unpaid and such stock shall not bear dividends after it has been called for redemption. Notwithstanding any of the foregoing provisions, the Board of Directors shall have the power from time to time and at any time to pay off or retire or secure a release or satisfaction of any preferred stock certificates to compromise or settle a dispute between the holder thereof and the association, or to settle an estate of a deceased or bankrupt stockholder or to close out a stockholder's interest when he has moved from the territory served by the association. Upon dissolution or distribution of the assets of the association the holders of all preferred stock shall be entitled to receive the par value of their stock, plus any dividends declared thereon and unpaid, before any distribution is made on the common stock, but preferred stockholders shall not further participate in the assets of the association.

Section 4: This association is authorized to issue revolving fund certificates as may be provided for in the by-laws of the association.

In Testimony Whereof, the undersigned incorporators of said association have hereunto set their hands on this the 26th day of August, 1970.

MARSHAL DURBIN FARMS
MARSHAL DURBIN, SR.
PAUL MORGAN
A. C. SMITH
LONNIE A. PILGRAM
MAYNARD SYLVEST

In the Superior Court of
Dekalb County, Georgia

The petition of Marshal Durbin, Paul J. Morgan, A. C. Smith, Lonnie A. Pilgram, and Maynard Sylvest, petitioners, shows the Court as follows:

1

The Articles of Incorporation of National Broiler Marketing Association executed by the incorporators are attached hereto.

2

The Certificate of the Secretary of State that the name "National Broiler Marketing Association" is available is attached hereto.

Wherefore, petitioners pray that National Broiler Marketing Association be incorporated as an association under the Cooperative Marketing Act (Ga. L. 1921, p. 139).

/s/ CHARLES T. ZINK
Attorney for Petitioners

HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303
522-3558

Order

Upon consideration of the foregoing petition, it appearing that the same is legitimately within the purview and intention of the Code of Georgia 1933, Sections 65-201 to 65-231, both inclusive, as amended, and it further appearing to the Court that

the name of the proposed corporation is not the name of any other existing corporation registered in the records of the Secretary of State of Georgia:

It Is Therefore Ordered, that the petition be granted and filed, and that petitioners be and they are hereby incorporated under the name and style of National Broiler Marketing Association, for a period of fifty years, with all the rights and powers prayed for in said petition and with all the rights and powers given by law to a corporation of a similar nature.

This the 15th day of September, 1970.

/s/ HUBERT C. MORGAN
Judge
Superior Court Stone Mountain Circuit

I swear that the contents of the above and foregoing petition are true and correct, so help me God.

/s/ A. C. SMITH

Sworn to and subscribed before me this 11th day of September, 1970.

(Illegible)
Notary Public
Forsyth County, Georgia

New Era Publishing Company Inc.
525 Marshall Street
P. O. Box 310
Decatur, Georgia 30031

Publisher's Affidavit

Georgia—DeKalb County

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, Carol E. Wheeler, who first being duly sworn, deposes and says on oath that he/she is the Bookkeeper of The DeKalb New Era, a newspaper having a general circulation and its principal office in DeKalb County, Georgia, and that there has been deposited with said newspaper sufficient funds to cover the costs of advertising the (Petition, Articles of Incorporation) entered thereon in the matter of National Broiler Marketing Association, once a week for four weeks.

/s/ CAROL E. WHEELER

Sworn to and subscribed before me this 15th day of September 1970.

/s/ JEAN B. EVANS
Notary Public

Notary Public, Georgia State at Large

My Commission Expires March 9, 1971

STATE OF GEORGIA

Office of Secretary of State

I, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, do hereby certify, that based on a diligent search of the

records on file in this office, I find that the name of the following proposed domestic corporation to wit

"NATIONAL BROILER MARKETING ASSOCIATION"

is not identical with or confusingly similar to the name of any other existing domestic or domesticated or foreign corporation registered in the records on file in this office or to the name of any other proposed domestic or domesticated, or foreign corporation as shown by a certificate of the Secretary of State heretofore issued and presently effective.

This certificate is in full force and effective for a period of 4 calendar months from date of issuance. After such period of time, this certificate is void.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of office, at the Capitol, in the City of Atlanta, this 3rd day of September, in the year of our Lord One Thousand Nine Hundred and Seventy and of the Independence of the United States of America the One Hundred and Ninety-Fifth

/s/ BEN W. FORTSON, JR.
Secretary of State
Ex-Officio Corporation
(Seal) Commissioner of the State of Georgia

Filed in Office This 15th Day of September, 1970.

THERON BURGESS,

Georgia, DeKalb County:

I, Theron Burgess, Clerk of Superior Court, in and for said County, hereby certify that the foregoing is a true and correct

copy of Articles of Incorporation of "National Broiler Marketing Association" and Order of Court, granting same, as appears of file and of Record in my office, and that all cost in said proceedings have been paid.

Witness my hand and the seal of said Court, this 15th day of September, 1970.

/s/ THERON BURGESS
Clerk Superior Court,
DeKalb County, Georgia

Exhibit B

BY-LAWS
OF
NATIONAL BROILER MARKETING ASSOCIATION

Article I

Purposes and Powers

The purposes for which this association is formed and the powers it may exercise are set forth in the Articles of Incorporation of the association.

Article II

Membership and Membership Meetings

Section 1: Qualifications: No person, firm or corporation shall be eligible for membership in this Association unless such person, firm or corporation shall be a producer of agricultural products, or an association of such producers, and shall also patronize this Association in accordance with uniform terms and conditions prescribed by the Board of Directors of the As-

sociation. Applications for membership in the Association shall be made in writing on a form provided by the Association and upon payment of a $100.00 membership fee and the acceptance of such application there shall be issued to the newly accepted member a membership certificate, which certificate shall be the only evidence of membership in the Association.

Section 2. Termination of Membership: In the event the Board of Directors shall find, following a hearing, that any member of the Association has ceased to be eligible for membership, the membership certificate of such member shall be cancelled and such member shall thereupon cease to be a member of the Association and shall thereafter have no vote or voice in the management of the Association or any property interest in the Association other than such interest as shall be accorded to him by law or by these By-Laws of the Association.

Section 3. Non-Transferable: Membership in the association shall not be transferable except by and with the consent of the Board of Directors of the association.

Section 4. Annual Meeting: The annual meeting of members of this association shall be held within 120 days after the end of the fiscal year of the association at such place and at such time as may be determined by the Board of Directors.

Section 5. Special Meetings: Special meetings of members may be held at any time and place as the President or a majority of the Board of Directors may order and a special membership meeting shall be called by the President upon written request of 25% of the members of the association.

Section 6. Notice: Notice of annual meetings shall be mailed to the last known address of each member at least ten days prior to the meeting. Notice of special meetings shall be given by mail, telegram or telephone at least three days prior to the meeting. No notice of either the annual meetings or any special meet-

ing need state the purpose of the meeting unless the laws under which this association is incorporated require that the nature of the business to be transacted at such meeting shall be stated in the call or notice of the meeting.

Section 7. Quorum: 50% of the members in good standing present in person or by proxy at any membership meeting shall constitute a quorum for the transaction of business at such meeting.

Section 8. Voting: Each member of the association shall be entitled to only one vote upon each matter submitted to a vote at a meeting of members. Unless otherwise required by law, all questions shall be decided by a majority of the members voting thereon. Voting by proxy shall be permitted and voting by mail or wire confirmed by mail, on specific questions, shall be permitted by and with the consent of the Board of Directors and such votes shall be on ballots prescribed by the Board, which ballots shall state the time at which the vote shall be counted.

Article III

Directors

Section 1. Number and Qualification: The business and affairs of the Association shall be controlled by a Board of Directors of not less than five members nor more than 12 members, one of whom shall be appointed by the Commissioner of Agriculture of the State of Georgia to serve until his successor shall be appointed, and the remainder of which Board shall be elected in the manner provided in Section 2 of these By-Laws as in effect on the date of the adoption of this by-law amendment. Each elected member of the Board shall be a member of the Association or an agent or employee of a person, firm, or corporation which is a member of the Association.

Section 2. Election of Directors: At the first meeting of members of this association the members shall create five districts which are fairly representative of the broiler industry in the United States, and following the establishment of such districts directors shall be elected as follows:

(a) At the first meeting of members and at each succeeding annual membership meeting, the members of this association shall elect one member of the Board of Directors from each such district.

(b) At the first meeting of members and at each succeeding annual membership meeting, the members shall elect six directors at large; provided, however, that at all regular annual meetings of members after the first membership meeting the six directors at large shall be chosen as follows: The Treasurer shall advise membership of the three districts from which members of this association shall have provided, during the preceding fiscal year, the greatest dollar volume of patronage to this association and three directors shall be elected from the district whose members have provided the highest volume of patronage, two directors shall be elected from the district which shall have provided the second highest volume of patronage and one director shall be elected from the district which shall have provided the third highest volume of patronage. If any member has operations in more than one district the patronage of such member may, at the option of such member, be allocated to the district wherein the principal office of such member is located or may be prorated between the districts wherein such member produces broilers according to the number of broilers produced by such member in each district.

Section 3. Term: Directors shall be elected at each annual meeting of members to serve for a term continuing until the next annual membership meeting and until their successors are elected and qualified.

Section 4. Vacancies: If a directorship shall become vacant, the vacancy shall be filled for the unexpired term by the Board

of Directors, provided, however, a vacancy shall be filled by a member of this association from the same district as the director whose death, resignation or removal created the vacancy.

Section 5. Quorum: 50% of the Board of Directors shall constitute a quorum at any meeting of the Board.

Section 6. Compensation: The compensation, if any, of the Board of Directors shall be determined by the members of the association, but the reasonable expense of the individual members of the Board of Directors arising from the attendance at Board meetings shall be paid by this association if so ordered by the Board.

Section 7. Management of Business: The Board of Directors shall manage the business and affairs of the association and shall make the necessary rules and regulations relating to the management of the business and guidance of the officers, employees and agents of the association, which rules and regulations shall not be inconsistent with these by-laws or the laws under which this association is organized.

Section 8. Bonding: The Board of Directors may require that the Treasurer and any and all other officers, agents and employees charged by the association with the responsibility for the custody of the funds and property of the association shall give bond with sufficient surety for the faithful performance of their official duties.

Section 9. Meetings: Annual meetings of the Board of Directors shall be held immediately following the membership meeting at which the Board was elected, and no notice of such meeting shall be necessary. The Board shall also hold regular meetings at least once each third month and special meetings may be called at any time by the President or by any three members of the Board. Any business of the association may be transacted at any regular or special meeting of the Board

without the necessity of the notice or call of the meeting stating the business to be transacted, unless such prior notice of the business to be transacted is expressly required by the law under which this association is organized.

Section 10. Notice of Meetings: Oral or written notice of all meetings of the Board, other than regular annual meetings, shall be given by the Secretary or by some other officer of the association designated by the Board, to each director at least forty-eight hours prior to such meeting, but such notice may be waived by all directors and appearance at a meeting shall constitute a waiver of notice thereof.

Section 11. Executive Committee: The Board of Directors may, at its discretion, appoint from its own membership an executive committee of five or more members, which committee shall have such powers, discretions and duties as may, from time to time, be prescribed by the Board, subject to the general direction, approval and control of the Board. Minutes of meetings of such executive committee shall be recorded in the minute book of the association and copies of all minutes concerning action taken by the executive committee shall be mailed to all directors within one week of the date on which the meeting of the executive committee was held.

Section 12. Alternate Directors: The Board of Directors shall elect not less than two nor more than five alternate directors who shall be elected at large from members of the Association and shall attend all Board meetings and who shall be entitled to participate in all discussions of the Board. Such alternate directors shall not, however be entitled to vote unless one or more of the directors are absent from a meeting of directors, in which event the alternate directors shall temporarily, and for purposes of such meeting only, fill the vacancy of the director or directors who are absent from such meeting and may vote for and in lieu of the absent director or directors, but in no

event shall such alternate directors have more than one vote for each alternate director in attendance at the meeting.

Article IV
Officers

Section 1. Election: At each annual meeting of the Board, the Board shall elect by ballot a Chairman of the Board, a President, one or more Vice Presidents, a General Manager, a Secretary and a Treasurer, each of whom shall, subject to the discretion of the Board, hold office for one year or until the election and qualification of his successor. Only the Chairman of the Board, the President and Vice President need be members of the Board of Directors. The offices of Chairman of the Board and President may be combined in one person, as may also the offices of President and General Manager if the General Manager be a member of the Board. The Secretary and the Treasurer need not be members of the Board, and such offices may also be combined in one person. The Chairman of the Board shall be the Chief Executive Officer of the Association, may call and shall preside at all meetings of directors and of membership, shall be an ex officio member of all committees and shall perform all duties customarily performed by the Chief Executive Officer of a corporation. In the absence or disability of the Chairman, the Vice President with the longest tenure in office as such shall perform all duties of the Chairman of the Board.

Section 2. President. The President shall be the Chief Operational Officer of the Association, shall supervise the performance of the duties of all employees of the Association, including the General Manager, and, if the offices of President and General Manager are combined, shall perform all the duties of General Manager. The President shall also perform such other duties as may, from time to time, be assigned to him by the Board, including the execution of all contracts and documents required

to be executed by the Association, provided, however, the Board of Directors may authorize any officer or agent of the corporation to execute particular contracts and documents required to be executed by the Association.

Section 3. Vice President: The duties of the Vice President shall be to perform the duties of the President in the absence or disability of the President and if there shall be more than one Vice President, the Board shall designate the order in which the Vice Presidents shall succeed to the responsibility for the performance of the duties of the President.

Section 4. Secretary: The duties of the Secretary shall be to:

(a) Keep a complete record of all meetings of the association and of the Board of Directors and the executive committee, and to have general charge and supervision of the books and records of the association.

(b) Sign, with the President, all instruments on behalf of the association, subject to the provisions of Section 2(c) of this article.

(c) Serve all notices required by law and by these by-laws and make a full report of the matters and business pertaining to his office to the members at the annual meeting.

(d) Be custodian of all property of the association.

(e) Make all reports required by law and perform such other duties as may be required of him by the association or by the Board of Directors.

Section 5. Treasurer: The duties of the Treasurer shall be to:

(a) Perform such duties with respect to the finances of the association as may be prescribed by the Board of Directors and to make all necessary reports to the Board and

perform all duties that may properly be required of him by the Board.

Section 6. General Manager: Under the supervision of the Board of Directors, the General Manager shall have charge of the ordinary and usual day to day business operations and affairs of the association and shall attend all meetings of the Board of Directors unless excused by the President. Subject to the general approval of the Board of Directors, the Manager shall employ, supervise and dismiss all agents and employees of the association.

Section 7. Indemnification of Officers and Directors: The corporation shall indemnify any and all persons who may serve or who have served at any time as directors or officers, and their respective heirs, administrators, successors and assigns against any and all expenses, including amounts paid upon judgments, counsel fees, and amounts paid in settlement (before or after suit is commenced), actually and necessarily incurred by such persons in connection with the defense or settlement of any claim, action, suit, or proceeding in which they, or any of them, are made parties, or a party, or which may be asserted against them or any of them, by reason of being or having been directors or officers of the corporation, except in relation to matters as to which any such director or officer or former director or officer shall be adjudged in any action, suit, or proceeding to be liable for his own negligence or misconduct in the performance of his duty. Such indemnification shall be in addition to any other rights to which those indemnified may be entitled under any law, by-law, agreement, vote of stockholders, or otherwise.

Article V

Membership Certificates

This Association shall be a non-stock membership cooperative association issuing to its members a membership certificate of the following form and content:

Membership Certificate

No. . . . . .

This certifies that . . . . . of . . . . . is a member of National Broiler Marketing Association and is entitled to all of the rights, benefits and privileges of the Association.

Dated . . . . . .

. . . . . President

. . . . . Secretary

Article VI

Financial Affairs

Section 1. Operation at Cost: The association shall at all times be operated on a cooperative service-at-cost basis for the mutual benefit of its patrons. No interest or dividends shall be paid by the association on any patronage capital furnished by the patrons as provided in the next succeeding section of this article.

Section 2. Refunds and Patrons' Capital: In furnishing service, such as marketing products, providing supplies and equipment, or otherwise making facilities or services available to its patrons, the association's operations shall be so conducted that all patrons will, through their patronage, furnish capital for the association. To assure that the association will operate on a service-at-cost basis, the association is obligated to account on a patronage basis to all its patrons for all amounts received from the furnishing of these services in excess of operating costs and expenses properly chargeable against the type of service furnished. All such amounts in excess of operating costs and

expenses shall, at the moment they are received by the association from the patrons, be received with the understanding that they are provided as capital. The association is obligated to make payments of all such amounts in excess of operating costs and expenses in cash refunds or by credits to a capital account for each patron. The books and records of the association shall be set up and kept in such a manner that at the end of each fiscal year the amount of capital, if any, so furnished by each patron is clearly reflected and credited in an appropriate record to the capital account of each patron. The association shall, within 8½ months after the close of the fiscal year, notify each patron, in the form of a written notice of allocation (as defined in 26 U.S.C., Section 1388), of the amount of capital so credited to his account. All other amounts, such as interest on amounts from non-patronage sources, received by the association from its operations in excess of costs and expenses shall, insofar as permitted by law and to the extent practical, be allocated to its patrons on a patronage basis and any amount so allocated shall be included as a part of the capital credited to the accounts of patrons as herein provided. An operating loss shall be apportioned among the patrons during the year of loss so that such loss will, to the extent practical, be borne by the patrons of the loss year on an equitable basis. If in any fiscal year the association shall incur a loss other than an operating loss, the Board shall have full authority to prescribe the basis on which capital furnished by patrons may be reduced or such loss otherwise equitably apportioned among the patrons.

Section 3. Revolving Capital: If, at any time, the Board shall determine that the financial condition of the association will not be impaired thereby, the capital then credited to patrons' accounts may be retired in full or in part. Any such retirement of patrons' capital shall be made in order of priority according to the year in which the capital was furnished and credited, the capital first received by the association being first retired. Notwithstanding any other provision of these by-laws

the Board, at its discretion, shall have the power to retire any capitol credited to patrons' accounts on such terms and conditions as may be agreed upon by the parties in any instance in which the interest of the association and its patrons are deemed to be furthered thereby and funds are determined by the Board to be available for such purposes.

Section 4. Transfer: No assignment or transfer of any amount credited to the capital account of a patron shall be binding on this association without the consent of the Board nor until it shall have been entered in the books of this association. The association shall be entitled at its option at any time to set off against the capital account of any patron any part or all of the indebtedness of such patron to this association.

Section 5. Consent: Each person who hereafter applies for and is accepted to membership in this association and each member of this association on the effective date of this by-law who continues as a member after such date shall, by such act alone, consent that the amount of any distributions with respect to his patronage occurring after the effective date of this by-law, which are made in written notices of allocation (as defined in 26 U.S.C., Section 1388), and which are received by him from the association, will be taken into account by him at their stated dollar amounts in the manner provided in 26 U.S.C., Section 1385(a), in the taxable year in which such written notices of allocation are received by him.

Section 6. Accounting System: The Board of Directors shall cause to be installed a standard, approved system of accounts and other accounting procedures so that at all times the books of the association shall accurately reflect the financial condition of the association.

Section 7. Annual Audit: The records and accounts of the association shall be audited once each year by a competent

public accountant and the annual audit report shall be presented at the annual meeting of members and a copy thereof kept in the permanent files of the association.

Section 8. Records: At all times accurate records and accounts shall be kept by the association from which may be readily determined the exact amount of business done with the association by each of its patrons.

Article VII
Dissolution

Upon dissolution, all debts and liabilities of the Association shall be first paid, the membership fees paid by the members shall then be refunded, all capital furnished through patronage shall then be retired without priority on a pro rata basis, and the remaining property and assets of the Association, if any, shall be distributed among the members and former members in the proportion which the aggregate patronage of each member bears to the total patronage of all members.

Article VIII
Fiscal Year

The fiscal year of the association shall commence on the first day of January of each year and shall end on the last day of December.

Article IX
Construction of By-Laws and Contracts

It is the purpose and intention of this association to promote the agricultural interest of its members by lawful means only, and, accordingly, any of these by-laws and any contracts or agreements made by this association which may be in conflict with the laws of the United States or of the State of Georgia

shall be taken and interpreted as amended and modified by such laws to the extent that may be necessary to uphold the validity of such by-laws, agreements or contracts. This association shall also at all times cooperate fully with the United States Department of Agriculture in seeking to carry out and make effective the Marketing Guides published by said department, and this association shall never itself take any action or recommend to its members that the members of this association take any action which would be inconsistent or in conflict with the published recommendations of said department. To the extent that said department shall be willing to receive such advice, this association shall keep the said department fully informed as to any and all policies and programs which may be recommended by this association to its members to carry out and make effective the Marketing Guides published by said department.

Article X
Amendments

If notice of the character of the amendment proposed shall have been given in the notice of a membership meeting, these by-laws may be altered or amended by any regular or special meeting of members by the affirmative vote of a majority of the members of the association in attendance at such meeting, provided that a quorum of members is present in person or by proxy.

Certificate

I, HUGH PURNELL, Secretary of National Broiler Marketing Association, hereby certify that the above and foregoing "BY-LAWS OF NATIONAL BROILER MARKETING ASSOCIATION" constitutes and is a full, true and correct copy

of the By-Laws of said Association as in force and effect on the date of the execution of this Certificate.

THIS the 25 day of April, 1975.

/s/ HUGH PURNELL
Secretary

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF IRSTON R. BARNES

(Filed May 1, 1975)

State of Connecticut
County of New Haven

I, Irston R. Barnes, after first being duly sworn, on oath depose and say the following:

1

I am an economic consultant, having my principal office at 58 North Branford Road, Wallingford, Connecticut, 06492.

2

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment in this action.

3

I am a graduate of Yale College with a major in economics. I also received a Ph. D. in economics from Yale University.

4

My professional career in economics has been divided between university teaching, government service, and independent economic consulting.

5

I was for thirteen years a member of the Economics Department of Yale University, where, in addition to other courses, I taught graduate and advanced undergraduate courses in government regulation of business and antitrust and trade regulation. In 1948-1949, I was a visiting professor at the Graduate School of Business at Columbia University, and from 1960 to 1963, I was professor of political economy at the Graduate School of Business, teaching courses in government regulation and economic institutions.

6

From 1941 to 1944, I was a consulting economist in the Antitrust Division of the Department of Justice. From 1944 to 1948, I was at the Civil Aeronautics Board, first as Director of the Economics Bureau, and subsequently as Economic Adviser to the Board. From 1948 to 1960, I was at the Federal Trade Commission, serving at times as Chief of the Division of Economic Evidence and as Economic Adviser to the Bureau of Litigation.

7

I began consulting work in 1960 and since 1963, I have devoted all my time to consulting. My practice has been principally concerned with antitrust and trade regulation, but it has also involved transportation, gas and electric utilities, and communications companies.

I have testified in some sixteen litigated matters, for the government and for private parties, before the Federal District Courts, the Federal Trade Commission, the Interstate Commerce Commission, and the public utility commissions of New York, Pennsylvania, and Maryland. I have also testified on a variety of antitrust subjects before committees of the Congress.

8

I have published three books on public utility regulation and numerous articles in economic and law journals on antitrust and trade regulation and public utility regulation. And on numerous occasions I have discussed antitrust enforcement problems as a member of panels sponsored by The Conference Board (formerly, the National Industrial Conference Board), the Practising Law Institute, and the American Law Institute—American Bar Association.

9

In the course of my professional work, I have prepared, conducted and analyzed numerous surveys of economic and business facts. I have had substantial experience in the preparation of tabulations, summaries and analyses of economic facts and data from such surveys for evidentiary use.

10

In June, 1974, a Membership Survey of Relations with Growers, designed by me and prepared under my supervision, was mailed to all current members of the National Broiler Marketing Association. The development, preparation, pretesting, conduct and analysis of the survey were carried out under my direct and continuing supervision. At the time of mailing, there were 65 members of NBMA. Survey returns were received from 60 members; no returns were received from 5 members.

11

As received, the survey returns were duplicated and copies were reviewed by me, by NBMA's attorney, and by the NBMA

coordinator. During the period when members were completing the survey, the NBMA coordinator was available to answer any questions that the members might have, and if necessary to explain or interpret the questions. On all matters of substance, the NBMA coordinator consulted with me and with the attorney before responding to questions received from members.

12

As received, the survey returns were examined for consistency of answers with known industry facts by the NBMA coordinator. I reviewed all survey returns independently, and they were also reviewed independently by the attorney for the sufficiency of answers and for internal consistency. Following these independent reviews I conducted a review of each survey return jointly with the attorney and the NBMA coordinator, and any deficiencies in the surveys were noted. I then instructed the coordinator to communicate with members for the purpose of correcting any deficiencies in the survey returns and also for the purpose of confirming our understanding and interpretation with respect to data reported in an unclear or questionable manner.

Where revisions were required to correct deficiencies in the survey, members were asked to furnish confirmatory affidavits setting out all additions and revisions.

13

Some of the survey questions permitted answer by reference to the member's standard grower contract submitted with the survey return. Such questions, where not fully answered on the survey form by the member, were answered by the NBMA attorney in accordance with my direction on the basis of the contract submitted by the member. Where the questions were answered on the survey form by the member, those answers were verified by the attorney on the basis of an examination of the contract submitted by that member.

14

While the survey was still in progress, a number of private treble damage actions were brought against NBMA and some of its members and also against some non-member producers. As a result of this private litigation, 21 members have resigned from membership in NBMA as of April 15, 1975, presumably as a means of limiting any further potential liability. The private litigation partially disrupted the original plan to secure confirmation of all revisions and additions to correct survey deficiencies by having members execute affidavits. Consequently, the present compilation covers 54 members and former members of NBMA, 42 of which have executed affidavits verifying their survey returns and any additions and revisions thereto, and 12 of which have provided information which completes their respective surveys in a satisfactory manner but without the executed affidavit.

15

No data are compiled and reported with respect to 6 members and former members whose survey returns remain incomplete, or, of course, for 5 former members who failed to return the survey.

16

Tabulations of data reported in the Membership Survey of Relations with Growers are attached to and incorporated in this affidavit as Tables G-1, G-2, G-3, G-4, G-6 and G-7. All tabulations were prepared by me and have been verified to the original surveys by two verifiers under my direct supervision.

17

The production of ready-to-cook broilers involves six functions which are generally performed under the management and direction of an integrated producer, or integrator. These six functions include:

(a) The maintenance of a hatchery supply flock to produce eggs for hatching.

(b) The operation of a hatchery to incubate the eggs and to produce baby chicks.

(c) The growing of the chickens to market weight.

(d) The formulation and supply of feed, medicines, vaccines and other supplies essential to the growing operations.

(e) The processing of the live birds into ready-to-cook broilers.

(f) The marketing of ready-to-cook broilers.

18

All six operations are organized or integrated by most of the producer-members of NMBA, justifying the common reference to them and to others like them as "integrators".

19

There is no standard or prevailing form of business organization for the integrated production of ready-to-cook broilers. Most NBMA producer-members accomplish some of the essential functions through subsidiaries, through affiliated companies under common ownership, through profit and loss sharing contractual arrangements such as partnerships and joint ventures, through membership in a cooperative, or by independent contractual relations. These complex inter-company and contractual relations do not alter the basic fact that the integrator-producer-member is responsible for production and marketing decisions and bears the major risk of production and marketing.

20

More than 95% of the broilers marketed today in the United States are produced and marketed by integrated producers like the members of NBMA. (USDA, The Chicken Broiler Industry, Mkt. Res. Rep. No. 930, p. 3 (1971)).

21

The full diversity of arrangements employed by member integrators in the production of broilers is shown in Table G-1, Scope of Members' Operations and Contract Relations with Growers, attached to and incorporated in this affidavit.

22

The 54 NBMA members supplying usable returns had some 57 arrangements with respect to the ownership and operation of their hatchery supply flocks. In 34 instances, the member-producer owned and controlled the hatchery flock directly. In 13 instances, the hatchery supply flock was owned and controlled by an affiliated company under common ownership with the member-producer. In 4 instances, a subsidiary owned and controlled the hatchery supply flock. And in 6 instances, the hatchery supply function was performed for the producer-member by an independent contracting party. (Table G-1).

23

The hatcheries, which supplied the 54 reporting NBMA members with baby chicks for the growout, were owned and operated directly by the producer-member in 32 instances, by an entity affiliated with the member-producer by common ownership in 16 instances, by a subsidiary of the member-producer in 4 instances, and by an unaffiliated company under contract in 5 instances. (Table G-1).

24

Feed is the largest element of cost in producing ready-to cook broilers. The 54 reporting members were supplied by 56 feedmills. Thirty-two were owned and operated directly by the NBMA member-producers; 14 were operated by affiliates under common ownership with the member-producer; 3 were operated by subsidiaries of member-producers; and 7 were independent, supplying feed under contract. (Table G-1).

25

Integrated broiler producers typically accomplish the grow-out of their broiler chickens (raising the chickens from day-old chicks to seven to nine-week-old chickens) through contractual arrangements with independent contractors, referred to as growers, whereby the contracting growers provide facilities and services necessary to care for the chickens for the growout period as determined by the integrator. In managing the growout, some 57 contractual arrangements were used by the 54 reporting members. In 37 instances, producers-members contracted directly with the growers; in 13 instances, entities affiliated with the member by common ownership contracted with the growers; and in 7 instances, subsidiaries of the member handled the growout contracting. One member grows out all of its chickens in facilities owned by the member. (Table G-1).

In addition to contracting with growers for the growout, 22 of the producer-members owned and operated some growout facilities of their own at the time of the survey. The growout capacities of these producers ranged from 49,250 to 1,503,000 birds, the average being 345,018.

26

Processing was accomplished under 64 arrangements for the 54 reporting producer-members. In 24 instances, the processing operations were owned and operated directly by the producer-members; in 18 instances, by entities affiliated with the producer-member under common ownership; in 11 instances, by subsidiaries of the member; in 2 instances through a profit and loss sharing contractual arrangement or partnership; and in 9 instances, by contract with an unaffiliated entity. (Table G-1).

27

The marketing function was handled directly by the producer-member in 23 instances, by an affiliate under common ownership in 17 instances, by subsidiaries in 10 instances, by an entity

associated with the producer-member in a profit and loss sharing relationship in 2 instances, and by independent companies under contract in 10 instances. (Table G-1).

28

The integrated producer, not the contract grower, owns the broiler "crop" or flock and bears the risk of its loss, as for example, from disease or natural disaster, at all stages of production. All of the reporting NBMA members reported that the member retained title to the broiler flock during the growout period, with three exceptions. The first exception was a grower-owned cooperative member (M-27)* whose contract arrangement establishes ownership of the birds, feed and supplies in its grower members. The second exception related to a contract which provides that the producer and the grower have joint title to the birds during the growout period, but the member-producer (M-46) retains the risk of loss of the flock during that time. The third exception involves a situation where the contract purports to sell chicks to the grower, but provides that the integrator (M-47) "assumes the loss of the cost of the chicks, feed and other materials supplies" in the event of death of the birds. Thus, for all practical purposes, in all situations, even including the three exceptions, it is the producer-member which bears the risk of loss of the flock. The specific details with respect to ownership and risk of loss are set out in Table G-2, Contract Provisions regarding Title to Broilers and Risks of Loss During Growout Period, attached to and incorporated in this affidavit.

29

In addition to owning and bearing the risk of loss of the broiler chickens at all stages of production, including the grow-

* In tabulating the data contained in the survey returns, each reporting member was assigned a code number prefixed by the letter "M". Data contained in the annexed tables relating to specific members are referred to herein by reference to members' code numbers.

out, all NBMA members* own and bear the risk of loss of the feed used in the growout as well as the vaccines, medicines, other health supplies, and most other elements included in the cost of producing broilers. All 54 reporting producer-members stated that they, rather than their growers, perform the following functions and responsibilities with respect to the growout:

(a) make all decisions with regard to the age and size at which birds shall be marketed (one producer-member (M-7) reported that its decision-making responsibility was shared with the entity operating the processing facilities);

(b) provide supervision of the growout;

(c) pay for all feed used during the growout;

(d) pay for all medicines, vaccines and other health supplies;

(e) supply all veterinary services during the growout;

(f) provide labor and equipment for catching, cooping, and loading the live birds; and

(g) transport birds from the grower's broiler house to the processing plant at the member's expense.

Specific details are set forth in Table G-3, Members' Responsibilities During Growout Period, attached to and incorporated in this affidavit.

30

Responsibility for payment for heating fuel used during the growout normally rests with the grower, but many NBMA members share in fuel costs. Six NBMA members reported that they supply and pay for all fuel used in the growout. One member (M-2) reported paying a fuel allowance of 4 cents per roaster and 3 cents per broiler grown, and in addition, reported financing the fuel and litter costs for approximately 10% of

* Except for Member M-27, the grower-owned cooperative whose contract arrangement establishes ownership of the birds, feed and supplies in its grower-members.

its growers with no financing charge. One member (M-5) supplies fuel costs during the winter period, and another member pays a fuel allowance to its growers from November through February. (M-15). One member (M-30) paid a fuel allowance of 0.2 cents per pound beginning November 1, 1973. Another member (M-52) pays a fuel allowance of $15.00 per 1,000 birds during the winter months, provided that a minimum temperature is maintained in the broiler houses, while another (M-56) pays a fuel allowance of 1 cent per bird during the winter. Another member (M-58) has a contract which provides that the growers furnish fuel and litter, and the company pays the grower an allowance which, under normal management and weather conditions, covers these costs. Another member (M-62), which does not pay fuel costs, supplies the grower with LP gas on credit until the flock is picked up. (Table G-3).

31

Litter used in the growout is normally paid for by the grower. Producer-members indicated that they did not supply and pay for litter in 38 instances, while they did supply and pay for litter in 18 instances. Two of the producer-members (M-2 and M-19) who do not pay for litter indicated that they would supply litter to their growers on credit. One (M-10) of the 18 members supplying litter indicated that its practice of paying for litter was discontinued after July of 1974, and another member (M-60) indicated that, while it supplied litter to one group of contract growers, two other geographically distinct groups of contract growers supplied and paid for their own litter. (Table G-3).

32

All but 4 reporting members responded that they assist growers with site selection, equipment selection, construction advice and other technical matters in constructing, enlarging or modernizing their broiler houses. (Table G-3).

33

In summary, NBMA's members own and bear the risk of loss of all feed, medicines, vaccines, and most other supplies essential to the production of a marketable broiler, and make all decisions with respect to production and marketing of the broilers produced under contract with growers. Specific details with respect to the producer-members' responsibilities during the growout period are tabulated in Table G-3, attached to and incorporated in this affidavit.

34

Contract growers are protected against the risks of losses through guarantees of minimum payments. All NBMA members reporting on the grower survey guarantee their contract growers minimum payments as shown by Table G-4, Contract Payments by Members to Growers, attached to and incorporated in this affidavit.

35

On the basis of an analysis of costs of representative growers, the minimum guarantees provided by NBMA members (Table G-4) more than cover the growers' investment costs. Table G-5, Investment Costs of Representative Small-to-Large Growers and Percentages of Costs to Grower Receipts, 1974, attached hereto and incorporated herein, sets out an analysis of specific costs of representative growers derived from affidavits of the growers filed in this action in support of NBMA's motion for summary judgment. With two exceptions (noted in the footnotes to Table G-5), investment costs (insurance, maintenance and depreciation on broiler houses and equipment) for the surveyed growers amounted to only 20 to 28% of the growers' receipts from contract payments. The investment costs reported in all cases represented an amount more than covered by the minimum guarantees in the contracts of all reporting members.

36

Contract guarantees of the reporting members are stated in the contract on either a per pound or per head basis. As stated on a per pound basis, the minimum contract guarantees in the reporting members' contracts ranged from .75 cent per pound to 2.6 cents per pound. Of the 36 producer-members stating contract-guaranteed minimums on a pound basis, 14 guaranteed minimum payments between 1½ and 2 cents per pound, and 17 members guaranteed minimums between 2 and 2½ cents a pound. There were 17 producer-members whose contracts stated guaranteed payment minimums on a head basis. Contract minimums among the reporting members ranged from a low of 4 cents per head to a high of 8½ cents per head. Specific details of the contract guarantees of reporting members are set out in Table G-4.

37

Table G-5 shows that representative growers who furnished affidavits relative to their costs of operations had costs other than their own labor varying from 33 to 87 percent of their annual receipts from contract payments, depending principally on the extent to which hired labor was used and included as an expense, to some extent on whether litter was furnished by the integrator and whether the grower offset the value of the used litter as fertilizer against the costs of fresh litter and cleanout expense, and the rates at which broiler houses and equipment were depreciated. The reporting growers depreciated their investments in broiler houses and equipment over relatively short periods; hence no separate interest expense was charged. The growers reported substantial differences in depreciation costs (8 to 27 percent of receipts), depending on the rates of depreciation, the ages of their broiler houses and equipment, and the extent to which their investments were fully depreciated.

38

Table G-6, Live Bird Production Costs: Percentage Distribution, attached to and incorporated in this affidavit, shows that

approximately 90% of the live bird ("farm level") cost of producing broilers is accounted for by inputs supplied by the integrator. The integrator inputs include feed, chicks, medications, veterinary supplies and services, growout supervision, and labor for catching, cooping and hauling.

39

NBMA members were asked to report on the percentage distribution of their costs in procuring live birds. The significant breakdown in these costs is between the payments made to growers, which cover the costs assumed by the growers and the earnings of the growers for their labor input, and all other live bird costs.

40

Payments to growers, on an unweighted arithmetic average, were 9.93% of live bird production costs for 53 reporting producer members. The percentages paid to growers varied from 4.4% to 16% but for 41 out of the 53 reporting members, the payments to growers were between 8% and 12% of live bird production costs. (Table G-6).

41

Live bird production costs other than payments to growers averaged 90.07% (unweighted arithmetic average) for the 53 reporting producer-members. For all reporting members, production costs other than grower payments fell between 84% and 96% of total live-bird production costs. (Table G-6).

42

The largest single element of cost in the production of broilers is the cost of feed. The broiler integrator, rather than the contract grower, is the purchaser of feed or feed ingredients on the open market, and bears the risk of fluctuation in the cost of feed due to market conditions. Analysis of Table G-6 shows

that the unweighted arithmetic average of feed costs to 52 reporting members was 71.62% of total live production costs.

43

The cost of chicks was, next to feed costs, the most important of the costs borne by the producer-members. The unweighted average cost of chicks for 52 reporting members was 12.38% of total live bird production costs. (Table G-6).

44

The broiler integrator, who sells broilers in a fluctuating market, has no guarantee of a remunerative price and therefore risks all of his investment in the production and marketing of broilers. Nevertheless, NBMA members guarantee to their contract growers minimum payments for the employment of their facilities and services which are at least equal to the grower's cost in each flock produced; thus the grower's contract is a "no-loss" contract.

45

The "no-loss" contract evolved in the broiler industry because of growers' unwillingness and inability to bear the risks associated with broiler production and marketing.

46

During the post-World War II period, when production of broilers in the United States has increased from less than 1 billion to more than 11 billion liveweight pounds, the marketing risks, as well as the risks of investment in feed, chicks and supplies, have been borne for the most part by integrated producers, feed dealers, processors or other growout contractors and not by individual growers. The initiative for producing broilers during this period has come from integrated producers, because individual growers have been unable or unwilling to build broiler houses, purchase equipment or buy chicks, feed

and other supplies in the absence of an integrator's "no-loss" contract program. (USDA, The Chicken Broiler Industry, Mkt. Res. Rep. No. 930, Table 1 (1971) and supplemental statistics).

47

U.S. Department of Agriculture sources show that the per capita consumption of broilers in the United States increased from 8.7 pounds in 1950 to 38.8 pounds in 1972, an increase of 445 percent in 22 years. (USDA, The Chicken Broiler Industry, Mkt. Res. Rep. No. 930, Table 1, a copy of which is attached to and incorporated in this affidavit.) I know from my reading of U.S. Department of Agriculture studies of broiler production which I consider to be reliable that, the development of broilers during this period as an inexpensive and desirable source of protein for consumers and the promotion of a broad national market for broilers as a popular commercial product were both brought about by the integrated producers, and not by growers.

48

Most contracts reserve to the producer-member the right to terminate the contract in the event of unsatisfactory performance by the grower, adverse economic conditions, or for other reasons. Analysis of Table G-7, Tenure in Member-Grower Relations, Efficiency Factors, and Competition for Growers: 1973, attached to and incorporated in this affidavit shows, however, that growers of at least average efficiency are assured by custom and practice, if not by contract, of regular placement of chicks by the broiler integrators with whom they contract. The contracts of 27 reporting NBMA members gave the grower an option to renew the contract; the contracts of 26 producer-members did not. Of the 26 producer-members whose contracts did not specifically give the grower an option to renew, 5 producer-members had contracts with provisions for placement of more than one flock, providing grower perform-

ance was satisfactory. Forty-three producer-members reported that they gave informal assurances to their growers that they would continue to place chicks with them provided performance was satisfactory, and only 10 members reported not giving such informal assurances to their growers. Only 5 producer-members gave neither a contract provision nor an informal assurance to their growers with respect to tenure arrangements, and these 5 had only 169 growers (5 percent of the total number of growers) under contract in 1973.

49

The great variety of contract and informal arrangements with respect to tenure is set forth in the various notes to Table G-7. Many contracts provide that the contract remains in force so long as it is mutually agreeable to the company and the grower, and several "new house construction" contracts guarantee a minimum of 20 flocks, a tenure of four or more years. Most contracts may, of course, be cancelled if the grower fails to give satisfactory performance measured in terms of feed conversion or production costs. Thus one contract (M-18) provides that "Failure of grower to maintain feed conversion at company average for two broods in four . . . shall terminate this contract, or [new flock will be] put in only at company discretion." The same contract reads "This contract shall be for five batches per year, provided [the company is] not forced to cut back production due to economic situations beyond [its] control." In another instance, the member (M-23) informally assures his growers of successive flocks as long as the member continues to place flocks in that area.

50

Producer-members were asked to report on the methods by which they adjusted production to changes in the seasonal demand for broilers, and their responses are tabulated in Table G-8, Order of Priorities in Procedures for Reducing Chick Placements to Adjust to Market Demand, attached to and in-

corporated in this affidavit. Extension or contraction of the period between the placement or replacement of flocks with growers in their normal sequence is by far the most frequent method employed. This method was the first recourse for 43 of the reporting members. It was used as a second choice by 6 members, and as a third choice by a single member.

Skipping some growers at the growers' option (usually during the winter months when heating costs are high and market demand is low) was the next most frequent method of reducing production employed by reporting members. Nine members reported that this method was their first recourse in accomplishing reductions in production; 13 other members reported it was a second-choice procedure; and 3 members reported that it was a third-choice procedure.

Reducing the number of birds per house is not a method used widely in adjusting the changes in production requirements. Only 2 members reported using this procedure in the first instance; 4 reported using it for second-round reductions; and 5 others reported using it as a third or later choice.

Reducing placements for some growers only was reported to be used only by 7 members, none as a first-choice procedure. Terminating some growers as a means of reducing production was reported to be a first or second choice of only 4 members; 11 other members indicated that they would resort to this procedure if they reached a third- or fourth-stage reduction in production.

51

The RTC broiler market is a typically high-risk agricultural market: the product must be marketed regardless of demand; the product is perishable; the market is subject to over-production, with many independent producers and a demand that is variable and non-predictable; the demand is seasonal and cyclical; there are close substitutes, e.g., beef and pork, available for the consumer and for the retailer; the market fluctuates

weekly; the buying side of the market is concentrated, dominated by large buyers; and the sellers are comparatively small, geographically scattered and poorly informed as to market conditions. In a market with such imperfections, there is a special need for improvements in the flow of market signals to producers to allow them to balance production with anticipated demand.

This 25th day of April, 1975.

/s/ IRSTON R. BARNES

Sworn to and subscribed before me this 25 day of April, 1975.

ETHEL B. PRONOVOST
Notary Public

My Commission Expires March 31, 1978.

NBHA SURVEY OF MEMBER - GROWER RELATIONS: SCOPE OF MEMBERS' OPERATIONS AND CONTRACT RELATION WITH GROWERS: 1974
Table G-1
Page 1 of 8

Member	Member's Functions Include—						Contracting with Growers	
	Hatchery Supply Flock	Hatchery	Feed Mill	Grow-Out Contracting	Grow-Out Facilities	Processing	Marketing	Directly	Thru Affiliate (Relationship)
M 2	C	C	C	D	None	D	D	Yes	P,C[a]
M 3	C	C	C	D	None	A	A	Yes	
M 4	C	C	C	D	140,000	D	D	Yes	
M 5	D	D	D	D	None	A,C[b]	A,C[b]	Yes	
M 6	D	D	D	D	64,000	A,C[c]	A,C[c]	Yes	
M 7	A	A	A	D	None	A[d]	A[d]	Yes	
M 8	D[e]	D[e]	D	NC[f]	584,000	A	A	Yes	
M 9	D	D	A	D	None	A	A	Yes	
M 10	A	A	A	D	560,000[g]	A	A	Yes	
M 11	C	A	A	A	None	D	D	No	A
M 12	D	D	D	A	50,000	O	O	No	A
M 13	A	A	A	A	None	A	D	No	A
M 14	O	O	O	D	None	C	C	Yes	
M 15	D	A	D,C[h]	D	None[i]	P	P	Yes	
M 16	A	A	A	A	58,000	D	D	No	A

NBMA SURVEY OF MEMBER - GROWER RELATIONS: SCOPE OF MEMBERS' OPERATIONS AND CONTRACT RELATION WITH GROWERS: 1974

Member	Member's Functions Include—							Contracting with Growers	
	Hatchery Supply Flock	Hatchery	Feed Mill	Grow-Out Contracting	Grow-Out Facilities	Processing	Marketing	Directly	Thru Affiliate (Relationship)
M 17	D	D	D	D	175,000[j]	C	C	Yes	
M 18	O	O	O	O	None	D	D	No	O
M 19	D	D	D	D	None	C	C	Yes	
M 20	C	C	C	D	None	P	P	Yes	
M 21	C	C	D	D	600,000	A	A	Yes	
M 22	D	D	D	D	None[k]	D	D	Yes	D
M 23	D	D	C	D	343,000	O	O	Yes	
M 26	D	D	D	O	1,503,000	O	O	No	O
M 27	D	D	D	D	None	D	D	Yes	
M 29	D	D	D	D	None	D	D	Yes	
M 30	D	D	D	D	528,750	O	O	Yes	
M 31	D	D	D	O	225,000	D	D	No	O
M 32	D	D	D	D	None	O	O	Yes	
M 37	A[l]	A[l]	A[m]	A[n]	260,000[o]	D,C[p];D	C	No	A[n]
M 38	D	D	D	D	70,000	A[q]	A[q]	Yes	
M 39	D	D	D	O	None	D	D	No	O

NBMA SURVEY OF MEMBER - GROWER RELATIONS: SCOPE OF MEMBERS' OPERATIONS AND CONTRACT RELATION WITH GROWERS: 1974

Member	Member's Functions Include—							Contracting with Growers	
	Hatchery Supply Flock	Hatchery	Feed Mill	Grow-Out Contracting	Grow-Out Facilities	Processing	Marketing	Directly	Thru Affiliate (Relationship)
M 41	A[r]	A[r]	A[s]	A[r]	None	D	D	No	A[r]
M 42	D	D	D	O	None	D	D	No	O
M 44	D	D	D	D	None	D	D	Yes	
M 45	D	D	D	D	None[t]	A	A	Yes	
M 46	D	D	D	D	None[u]	D	D	Yes	
M 47	A	A	A	A	75,000	D	D	No	A
M 48[v]	D	D	D	D	361,000	D	D	Yes	
M 49	D	D	D	D	49,250	O	D	Yes	
M 50	D	D	A	D	None	A	A		
M 51	D	D	D	D	72,000[w]	D	D	Yes	
M 52	A	A	A	A	422,400	D	D	No	A
M 53	O	O	O	D	None	O	O	Yes	
M 54	D	D	D	D	573,000	D	D	Yes	
M 55	A	A	A	D	None	A	A	Yes	
M 56	D	A	D	D	None	A[x]	A[x]	Yes	
M 57	O	O	D	O	None	D,O[y]	O	No	O

NIMA SURVEY OF MEMBER - GROWER RELATIONS: SCOPE OF MEMBERS' OPERATIONS AND CONTRACT RELATION WITH GROWERS: 1974

Member	Member's Functions Include—							Contracting with Growers	
	Hatchery Supply Flock	Hatchery	Feed Mill	Grow-Out Contracting	Grow-Out Facilities	Processing	Marketing	Directly	Thru Affiliate (Relationship)
M 58	A	A	D	A	500,000	A	A	No	A
M 59	D	D	D	D	357,000	O	O	Yes	
M 60	D	D	D	A	None	A	A	No	A
M 61	D	D	D[z]	D	None	C	C	Yes	
M 62	D	D	A	D	None	O	O	Yes	
M 63	D	D	C	D	None	A	A	Yes	
M 64	D	D	D	D,O[aa]	None	O	O	Yes	O[aa]

KEY:

A = Affiliation through Common Owners
C = Contract Relationship
D = Directly by Member
NC = No Contract; Member grows all birds produced
O = Ownership; Subsidiary
P = Profit and Loss Sharing Contractural Arrangement or Partnership

a. The company contracts with growers directly, and also buys live birds from three independently owned corporations, one of which has a profit and loss sharing contractual arrangement with the member-company.

b. The live bird production of the member-company is processed by two plants, one of which is owned by a corporate entity affiliated with the member by common ownership, the other of which is independently owned and operated.

c. The live bird production of the member-company is sold to four different entities, one of which is owned almost entirely by the owners of the member-company.

d. The live bird production of the member-company is processed in plants owned by a corporation which is in part owned in common with the member-company, and has a profit and loss sharing agreement with the member-company.

e. The company owned and operated a hatchery, and controlled a hatchery supply flock until 1974, when the company-owned hatchery was closed.

f. The company owns and operates the grow-out facilities for all its production and has no contract relationship with any other growers.

g. This figure (560,000) is derived by multiplying the company's response of 700,000 square feet by .8 (square feet per bird), the standard placement ratio in the member's geographic area.

h. The member-company owns a feed mill, but also purchases feed from another corporate entity due to the small capacity of its own feed mill.

i. The company sold its company-owned grow-out facilities in 1973.

j. The company owns grow-out facilities having 95,000 head capacity; and rents facilities having 80,000 head capacity.

k. All company-owned grow-out facilities have been recently sold.

l. The member-company is organized as a cooperative owned by two cooperative members, each with a separate corporate identity. The hatchery supply flock and the hatcheries supplying the two cooperative members are owned and controlled by corporate entities which are under common ownership with the respective cooperative members.

m. See note "l" above. The two cooperative members each own and operate their own feed mills.

n. See note "l" above. Grow-out contracting for the first cooperative member is conducted by two corporate entities which are both under common ownership with the first cooperative member. The second cooperative member itself contracts with growers.

o. See note "l" above. The first cooperative member owns no grow-out facilities; the second cooperative member owns grow-out facilities with a capacity for 260,000 birds.

p. See note "l" above. The member-company owns a processing plant for processing the live bird production of its cooperative members. The member-owned plant processes all of one of its cooperative member's production. Some of the live bird production of the other cooperative member is sold to an independent processor.

q. The live bird production of the member-company is processed and marketed by a corporation which is partially owned by the owners of the member-company and has a profit and loss sharing contractual arrangement with the member-company.

r. The member-company is organized as a cooperative owned by three cooperative members, each with a separate corporate identity. Each cooperative member owns and controls a grow-out contracting operation, and each is affiliated through common ownership with a separate entity owning and controlling a hatchery and hatchery supply flock. All processing and marketing is done by the member-company.

s. See note "r" above. Feed for the cooperative members of the member-company is furnished by a feed mill which is owned equally by the three cooperative members of the member-company.

t. The company formerly owned some grow-out facilities but has recently phased them out.

u. Company-owned grow-out facilities were removed from production in 1972.

v. This company is no longer in business.

w. Of the reported company-owned grow-out capacity, space for 29,000 birds is devoted entirely to resea

x. The live bird production of the member-company is processed and marketed by two corporate entities, both of which are under common ownership with the member-company.

y. The live bird production of the member-company is processed by the member-company and by a wholly-owned subsidiary of the member-company.

z. Feed for the member-company's operation is manufactured in a feed mill leased from another company.

aa. Growout contracting is conducted by the member-company and by a wholly-owned subsidiary of the member-company.

NRMA SURVEY OF MEMBER-GROWER RELATIONS:
CONTRACT PROVISIONS REGARDING TITLE TO BROILERS AND RISKS OF LOSS DURING GROW-OUT PERIOD

Table G-2
Page 1 of 6

Member	Number Growers 1973	Title and risk of loss during grow-out period		Payments to growers if—			
		Member	Grower	Flock lost: disease	Flock lost: weather	Flock lost: no neglect	Flock lost: in transport
M 2	100	X		No	Yes	Yes	Yes
M 3	13	X		Yes	No	Yes	Yes
M 4	41	X		No Ex.	No Ex.	No Ex.	Yes
M 5	100	X		No Ex.	No Ex.	No Ex.	Yes
M 6	134	X		No Ex.	No	No Ex.	Yes
M 7	76	X		No Ex.	No Ex.	No Ex.	Yes
M 8	NC	X		NC	NC	NC	NC
M 9	216	X		Yes	Yes	Yes	Yes
M 10	243	X		No Ex.	No Ex.	No Ex.	Yes
M 11	113	X		No	No	No Ex.	Yes
M 12	204	X		Yes	Yes	Yes	Yes
M 13	122	X		Yes	No	Yes	Yes
M 14	60	X		No	No	No Ex.	Yes
M 15	113	X		No Ex.	No	Yes	Yes
M 16	87	X		Yes	Yes	Yes	Yes

NBMA SURVEY OF MEMBER-GROWER RELATIONS:
CONTRACT PROVISIONS REGARDING TITLE TO BROILERS AND RISKS OF LOSS DURING GROW-OUT PERIOD

Member	Number Growers 1973	Title and risk of loss during grow-out period		Payments to growers if—			
		Member	Grower	Flock lost: disease	Flock lost: weather	Flock lost: no neglect	Flock lost: in transport
M 17	39	X		No Ex.	No Ex.	No Ex.	Yes
M 18	99	X		No Ex.	No	Yes	Yes
M 19	69	X		No Ex.	No Ex.	No Ex.	Yes
M 20	90	X		No Ex.	No Ex.	Yes	Yes
M 21	92	X		Yes	Yes	Yes	Yes
M 22	155	X		No Ex.	No	No Ex.	Yes
M 23	299	X		Yes	Yes	No Ex.	Yes
M 26	36	X		No	No	Yes	Yes
M 27	1447		X[a]	No[b]	No[c]	No Ex.	Yes
M 29	212	X		No Ex.	No	No Ex.	Yes
M 30	114	X		No Ex.	Yes	No Ex.	Yes
M 31	235	X		No	No	No Ex.	Yes
M 32	843	X		No	No	No Ex.	Yes
M 37	248	X		Yes[d]	No[d]	No Ex.	Yes
M 38	133	X		Yes	No	Yes	Yes

NBMA SURVEY OF MEMBER-GROWER RELATIONS:
CONTRACT PROVISIONS REGARDING TITLE TO BROILERS AND RISKS OF LOSS DURING GROW-OUT PERIOD

Member	Number Growers 1973	Title and risk of loss during grow-out period		Payments to growers if—			
		Member	Grower	Flock lost: disease	Flock lost: weather	Flock lost: no neglect	Flock lost: in transport
M 39	216	X		Yes	Yes	Yes	Yes
M 41	203	X		Yes[e]	No, Yes[e]	Yes[e]	Yes
M 42	582	X		No	No	No	Yes
M 44	104	X		No Ex.	No Ex.	No Ex.	Yes
M 45	93	X		No Ex.	No Ex.	Yes	Yes
M 46	222	X[f]	X[f]	No	No	No	Yes
M 47	166		X[g]	No	Yes	Yes	Yes
M 48	103	X		No Ex.	No Ex.	No Ex.	Yes
M 49	489	X		Yes	Yes	Yes	Yes
M 50	262	X		No Ex.	Yes	No Ex.	Yes
M 51	275	X		No Ex.	No Ex.	No Ex.	Yes
M 52	60	X		No Ex.	No Ex.	No Ex.	Yes
M 53	1050	X		No	No	No Ex.	Yes
M 54	80	X		No Ex.	No Ex.	No Ex.	Yes
M 55	103	X		Yes	Yes	Yes[h]	Yes

NBMA SURVEY OF MEMBER-GROWER RELATIONS:
CONTRACT PROVISIONS REGARDING TITLE TO BROILERS AND RISKS OF LOSS DURING GROW-OUT PERIOD

Member	Number Growers 1973	Title and risk of loss during grow-out period		Payments to growers if—			
		Member	Grower	Flock lost: disease	Flock lost: weather	Flock lost: no neglect	Flock lost: in transport
M 56	96	X		No Ex.	No	No Ex.	Yes
M 57	293	X		No Ex.	Yes	Yes	Yes
M 58	139	X		Yes	No	No Ex.	Yes
M 59	235	X		No	No	No Ex.	Yes
M 60	481	X		No	No	Yes	Yes
M 61	89	X		Yes	Yes	Yes	Yes
M 62	634	X		No	Yes[i]	Yes[i]	Yes
M 63	130	X		Yes	Yes	Yes	Yes
M 64	275	X		No	No	No Ex.	Yes

NOTES
Table G-2

KEY:

NC = No Contract; Member grows all birds produced
No Ex. = No Experience

a. The member is a grower-owned cooperative whose contract arrangement establishes ownership of the birds, feed and other supplies in its grower-members.

b. Payment has been made to growers in a few cases. In 1970, about 40% of a grower's flock was condemned for air sac leukosis, and payment was made to the grower for his services and facilities with respect to the condemned birds.

c. The company (a grower-owned cooperative) carries insurance for loss of the birds in the case of fire. In some cases, the cooperative may reimburse the grower for fuel and litter costs.

d. The member-company is composed of two cooperative members, each of which has a separate corporate identity. The first cooperative member does make payments to growers who have lost a flock due to disease. The second cooperative member responded negatively to the question of whether or not payments were made to growers who had experienced disease losses. However, the second cooperative member did make payment at the contract minimum rate to one grower who lost an entire flock because of Newcastle's disease.
The second cooperative member responded that it did not make payments to growers who lost flocks due to severe weather. The first cooperative member had had no experience with the problem.

e. The member-company is composed of three cooperative members, each of which has a separate corporate identi
The first and the third cooperative members had had no experience with flock losses due to disease, while

NOTES
Table C-2

the second cooperative member did make payments to growers for disease-related losses. The first cooperative member did not make payments to growers for losses due to severe weather; the second cooperative member did make payments for weather-related losses. The third cooperative member had had no experience with such losses. The second cooperative member did make payments to growers when the loss of a flock was caused by no neglect on the part of the grower. The first and third cooperative members had had no experience with that type of situation.

f. According to the company's contract, the company and the grower have joint title to the birds. However, the contract provides that the company retains risk of loss of the flock during grow-out.

g. The contract of the company purports to sell chicks to the grower, but provides that the member-integrator "assumes the loss of the cost of the chicks, feed and other materials supplied" in the event of death of the birds.

h. In March, 1974, the company was ordered by the FDA to destroy a substantial portion of its live productio during grow-out because of contamination resulting fro Dieldrin-contaminated feed. Despite its total loss of all contaminated birds, the company has paid all fuel bills of the growers involved and has issued notes to the growers for payment at the contract rate should the company be successful in current litigation agains the feed ingredient dealers involved.

i. Compensation has been made in cases of tornado damage The company has had one instance in which the drug level in the feed furnished one grower was too high, resulting in a high mortality, reduced weight gains, and inefficient use of feed. Compensation was made to the grower on the basis of his normal performance on previous flocks.

NRMA SURVEY OF MEMBER - GROWER RELATIONS: MEMBERS' RESPONSIBILITIES DURING GROW-OUT PERIOD

TABLE C-3

Member	Number of Growers 1973	Decision To Market	Supervision Of Grow-Out	Pay For Feed	Pay For Health Supplies	Supply Veterinary Services	Loading of Live Birds	Transport To Processing Plant	Supply Fuel	Supply Litter	Advise On Grower Facilitie
M 2	100	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[a]	No[a]	Yes
M 3	13	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 4	41	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 5	100	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[b]	No	Yes
M 6	134	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 7	76	Yes[c]	Yes	Yes	Yes	Yes	Yes[d]	Yes[d]	No	No	Yes
M 8	NC	NC	NC	NC	NC	NC	NC	NC	NC	NC	NC
M 9	216	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
M 10	243	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes[e]	Yes
M 11	113	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
M 12	204	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
M 13	122	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 14	60	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 15	113	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[f]	No	Yes
M 16	87	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 17	39	Yes	Yes	Yes	Yes	Yes	No[g]	Yes	No	No	No
M 18	?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No		Yes

NBMA SURVEY OF MEMBER - GROWER RELATIONS: MEMBERS' RESPONSIBILITIES DURING GROW-OUT PERIOD

Member	Number of Growers 1973	Decision To Market	Supervision Of Grow-Out	Pay For Feed	Pay For Health Supplies	Supply Veterinary Services	Loading of Live Birds	Transport To Processing Plant	Supply Fuel	Supply Litter	Advise On Grower Facilities
M 19	69	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No[h]	Yes
M 20	90	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes[g]	No	Yes
M 21	92	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
M 22	155	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 23	299	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 26	36	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
M 27	1447	Yes	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes
M 29	212	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
M 30	114	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[i]	No	Yes
M 31	235	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 32	843	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 37	248	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes,No[j]	Yes,No[j]	Yes
M 38	133	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
M 39	216	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
M 41	203	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 42	582	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 44	104	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes

NBMA SURVEY OF MEMBER - GROWER RELATIONS: MEMBERS' RESPONSIBILITIES DURING GROW-OUT PERIOD

Member	Number of Growers 1973	Decision To Market	Supervision of Grow-Out	Pay For Feed	Pay For Health Supplies	Supply Veterinary Services	Loading of Live Birds	Transport To Processing Plant	Supply Fuel	Supply Litter	Advise On Grower Facilities
M 45	93	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
M 46	222	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[k]	No	Yes
M 47	166	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[l]	No	Yes
M 48	103	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
M 49	489	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
M 50	262	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[m]	No[m]	Yes
M 51	275	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 52	60	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[n]	No	Yes
M 53	1050	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 54	80	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 55	103	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
M 56	96	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[o]	Yes	Yes
M 57	293	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
M 58	139	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes[p]	Yes[p]	Yes
M 59	235	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
M 60	481	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes[q]	Yes
M 61	89	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes

NBMA SURVEY OF MEMBER - GROWER RELATIONS: MEMBERS' RESPONSIBILITIES DURING GROW-OUT PERIOD

Member	Number of Growers 1973	Decision To Market	Supervision Of Grow-Out	Pay For Feed	Pay For Health Supplies	Supply Veterinary Services	Loading of Live Birds	Transport To Processing Plant	Supply Fuel	Supply Litter	Advise On Grower Facilities
M 62	634	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No[f]	No	Yes
M 63	130	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
M 64	275	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes

NOTES
Table G-3

Key:

NC = No contract; member grows all birds produced.

a. The company pays a fuel allowance of 4¢ per bird on roasters and 3¢ per bird on broilers. Approximately 10% of the company's growers have fuel and litter financed by the company at cost, with no finance charge.

b. The company pays grower all fuel costs during the winter.

c. Decision is made jointly by member and the processing entity, a separate corporation partly owned by the owner of the member-company and performing under a profit and loss sharing contract arrangement with the member.

d. The processing entity, which is partly under common ownership and shares in a profit-loss relationship with the member-company, is responsible for providing transportation, labor and equipment to move the live birds to the processing plant.

e. The company supplied litter until July, 1974.

f. The company pays fuel allowances from November th ugh February.

g. The grower is reimbursed if his feed conversion is at an acceptable level.

h. The company has made some purchases of litter and supplied it to the growers on account.

i. Beginning November 1, 1973, the company paid a fuel allowance of .2 cent per pound.

j. The member-company is composed of two cooperative members, each of which has a separate corporate identity. The first cooperative member supplies fuel to its growers, but does not supply litter; the second cooperative member supplies litter to its growers, but does not supply fuel.

k. For two successive flocks beginning November 1, the grower receives .2 cent per pound fuel allowance.

l. The company pays a fuel allowance during the 'nter months.

m. The company supplied both fuel and litter prior to August, 1973.

n. The company gives a fuel allowance of $15 per 1,000 birds for the one winter batch of birds, if a prescribed minimum temperature is maintained in the broiler houses.

o. The company pays a fuel allowance of 1¢ per bird during the winter.

p. The contract says that the grower is to furnish fuel and litter, but the company pays the grower an allowance which the member indicated will cover these costs under normal management and weather conditions.

q. Company supplies litter at one operating location. Growers must furnish their own litter under contracts in effect at two other, geographically separate, operating locations.

r. The company supplies the grower LP gas credit until the flock is sold.

s. The company pays a fuel allowance amounting to 50 per cent of he growers' fuel costs.

NEMA SURVEY OF MEMBER-GROWER RELATIONS: CONTRACT PAYMENTS BY MEMBERS TO GROWERS

TABLE G-4
Page 1 of 5

Member	Number of Growers 1973	Market Clause In Contract	Guaranteed Minimum Payment			Efficiency Differential In Payment		
			Yes / No	Current Basis		Yes / No	Contract Provision	
				Per Pound	Per Head		Low Payment	High Payment
G 2	100	No	Yes	2.0		Yes	NA	NA
G 3	13	Yes	Yes		5.0	Yes	1.90 L	2.35 L
G 4	41	Yes	Yes	1.25		No		
G 5	100	Yes	Yes	1.5		Yes	1.5 L	2.267 L
G 6	134	No	Yes	2.0		Yes	1.6 L	2.6 L
G 7	76	Yes	Yes		4.0	Yes	1.2 L	2.55 L
G 8	NC	NC	NC			NC		
G 9	216	Yes	Yes		8.5 P	Yes	8.5 H	12.5 H
G 10	243	Yes	Yes	1.0		Yes	1.0 L	2.25 L
G 11	113	No	Yes	1.5		Yes	1.5 L	2.20 L
G 12	204	Yes	Yes		7.0	Yes	2.1 L	2.8 L
G 13	122	Yes	Yes	1.5		Yes	1.5 L	2.6 L
G 14	60	Yes	Yes		5.0	Yes	1.20 L	2.55 L
G 15	113	Yes	Yes		5.0	Yes	1.25 L	2.50 L
G 16	87	Yes	Yes		4.0 P	Yes	4.0 H	6.0+ H

NBMA SURVEY OF MEMBER-GROWER RELATIONS: CONTRACT PAYMENTS BY MEMBERS TO GROWERS

Member	Number of Growers 1973	Market Clause In Contract	Guaranteed Minimum Payment			Efficiency Differential In Payment		
			Yes / No	Current Basis: Per Pound	Current Basis: Per Head	Yes / No	Contract Provision: Low Payment	Contract Provision: High Payment
G 17	39	No	Yes		6.0	No		
G 18	99	No	Yes	2.1		Yes	2.1 L	3.6 L
G 19	69	Yes	Yes		5.0	Yes	3.1 H	7.35 H
M 20	90	Yes	Yes	1.25		Yes	1.25 L	2.20 L
M 21	92	Yes	Yes	[a]		Yes	NA	NA
M 22	155	No	Yes	1.59		Yes	1.59 L	2.93 L
M 23	299	No	Yes	2.60		Yes	2.60 L	3.60 L
M 26	36	Yes	Yes		4.0	Yes	3.25 H	9.75 H
M 27	1447	No	Yes	2.0		Yes	2.00 L	3.00 L
M 29	212	No	Yes	1.6		Yes	1.60 L	2.30 L
M 30	114	No	Yes	1.16		Yes	1.16 L	2.65 L
M 31	235	No	Yes	2.0		Yes	2.0 L	2.75 L
M 32	843	No	Yes	2.05		Yes	2.05 L	2.50 L
M 37	248	Yes	Yes		5.0[b] 6.5[b]	Yes Yes	4.0 H 1.9 L	10.25 H[b] 2.75 L[b]
M 38	133	No	Yes	2.338	6.5 P	Yes	NA	NA
M 39	216	No	Yes	2.25		Yes	2.25 L	3.00 L

NBMA SURVEY OF MEMBER-GROWER RELATIONS: CONTRACT PAYMENTS BY MEMBERS TO GROWERS

Member	Number of Growers 1973	Market Clause In Contract	Guaranteed Minimum Payment			Efficiency Differential In Payment		
			Yes / No	Current Basis: Per Pound	Current Basis: Per Head	Yes / No	Contract Provision: Low Payment	Contract Provision: High Payment
M 41	203	Yes	Yes	2.17[c]		Yes	2.17[c] L	3.12[c] L
M 42	582	No	Yes	1.5/1.9[d]		 Yes	1.50 L 1.90 L	2.50 L[d] 3.00 L[d]
M 44	104	Yes	Yes	1.40		Yes	1.40 L	2.60 L
M 45	93	No	Yes	1.2		Yes	1.20 L	2.475 L
M 46	222	No	Yes	1.85/2.00[e]		 Yes	1.85 L 2.0 L	3.00 L[e] 3.15 L[e]
M 47	166	No	Yes	1.5/2.25[f]		 Yes	1.5 L 2.25 L	2.75 L[f] 3.00 L[f]
M 48	103	Yes	Yes	1.0		Yes	1.0 L	2.50 L
M 49	489	Yes	Yes		8.5	Yes	8.5 H	U
M 50	262	No	Yes	2.0		Yes	2.0 L	2.5 L
M 51	275	No	Yes	1.9		Yes	1.9 L	2.7 L
M 52	60	No	Yes	1.61		Yes	1.61 L	2.22 L
M 53	1050	Yes	Yes	1.5		Yes	1.5 L	3.15+ L, U
M 54	80	No	Yes	1.75		Yes	1.75 L	2.25 L
M 55	103	No	Yes		4.0 P	Yes	4.0 H	U
M 56	96	No	Yes	1.5		Yes	1.5 L	2.25 L

NBMA SURVEY OF MEMBER-GROWER RELATIONS: CONTRACT PAYMENTS BY MEMBERS TO GROWERS

Member	Number of Growers 1973	Market Clause In Contract	Guaranteed Minimum Payment			Efficiency Differential In Payment		
			Yes / No	Current Basis: Per Pound	Per Head	Yes / No	Contract Provision: Low Payment	High Payment
M 57	293	No	Yes		6.75 S	Yes	6.75 H	9.0 H
M 58	139	No	Yes		5.0 P	Yes	5.0 H	U
M 59	235	No	Yes	2.25		Yes	2.25 L	3.00 L
M 60	481	Yes	Yes	.75/ 1.75/1.5[g]		Yes	.75 L 1.75 L 1.5 L	2.25 L[g] 2.20 L[g] 2.15 L[g]
M 61	89	Yes	Yes		6.0 P	Yes	6.0 H	10.0 H
M 62	634	No	Yes	2.0		Yes	2.0 L	3.30 L
M 63	130	No	Yes	2.0		Yes	2.0 L	2.40 L
M 64	275	No	Yes	2.1		Yes	2.10 L	2.70 L

KEY:

H = Per head
L = Per pound
NA= Not available
NC= No Contract; member grows all birds produced
P = Birds Placed (Started)
S = Birds Sold
U = No Upper Limit

a. "Guaranteed rent" is determined by the type of facilities and equipment the grower has, and is established with each individual contract.

b. The member-company is composed of two cooperative members, each of which has a separate corporate identity. The two cooperative members have different contracts, and their payment provisions are different.

c. The member-company is composed of three cooperative members, each of which has a separate corporate identity. The three cooperative members have different contracts and their payment provisions are different. The figures given here represent averages of the three cooperative members' payment provisions. The actual low and high payments of the three cooperative members are as follows: first, 2.20 - 2.80; second, 2.30 - 2.80; and third, 2.0 - 3.75.

d. The company has two contracts in force, one for each of its two geographically separate operations.

e. Growers not on probation (those Class "A" growers who follow company's recommended program) receive 2¢ minimum, growers on probation for not following program receive 1.85¢ minimum.

f. The company has two contracts, one for unimproved and one for improved housing.

g. The company has operations in three separate geographic areas, and uses a different contract for each location.

INVESTMENT COSTS OF REPRESENTATIVE SMALL TO LARGE GROWERS
AND PERCENTAGES OF COSTS TO GROWER RECEIPTS, 1974

Table G-5
1 of 2

Grower	William T. O'Neal	Kirk H. Davis	J. Troy Copeland	Albert B. Maddox	Maurice B. Layton	Thomas W. Sparks	
Year	1974	1974	1974	1974	1974	1974	
Receipts	$8,437.56	$21,541.00	$55,055.77	$13,225.08[a]	$10,500.00	$14,573.14[g]	
Costs other than own labor	3,211.75[cd] 38%	10,002.65[d] 46%	35,374.19[ef] 64%	4,910.00[bd] 37%	3,462.00[bd] 33%	13,028.09[be] 87%	60%
Investments costs (insurance, maintenance, depreciation)	2,031.00 24%	5,489.26 25%	13,113.38 24%	3,330.00 25%	2,142.00 20%	6,160.14 42%	28%
Depreciation only	767.00 21%	4,638.06 22%	9,680.75 18%	2,430.04 18%	800.00 8%	3,452.00 24%	16%
Service-life used for depreciation: Years-Houses/Equipment	15/15	10/8	15/15,8	10/8	10/20	10/10	

a. Payment reflects minimum payment of 6.5 cents per bird on one flock totally destroyed because of Dieldrin contamination.
b. Litter furnished by integrator.
c. No litter expense included, because grower considered fertilizer value of litter more than offset litter-related costs.
d. No substantial hired labor costs.
e. Substantial hired labor costs - all labor in growout performed by hired labor.
f. Shavings (litter) expense included. All litter used as fertilizer on grower's pasture; however, grower unable to calculate or estimate market value of fertilizer for comparison with litter-related costs.
g. Thomas W. Sparks' receipts for 1973 were $21,658.46; for 1973, all ratios would thereby be reduced by one-third, as indicated in the margin.

INVESTMENT COSTS OF REPRESENTATIVE SMALL TO LARGE GROWERS
AND PERCENTAGES OF COSTS TO GROWER RECEIPTS, 1974

Table G-5
2 of 2

Grower	Leroy E. Mayfield	James Martin	Ford Barrett
Year	1974	1974	1974
Receipts	$6,925.84	$6,617.00	$12,171.01
Costs other than own labor	3,365.09 49%	5,578.00 83%	7,442.57 61%
Investments costs (insurance, maintenance, depreciation)	1,555.18 22%	2,735.00 41%	2,862.57 24%
Depreciation only	1,129.56 16%	1,801.00 27%	1,830.07 15%
Service - life used for depreciation: Years - Houses/Equipment	15/4-10	10-15/2-15	10/

a. Includes $345 for litter; used litter reported to have fertilizer value of $3,800.00
b. Includes $204 paid for spreading litter on fields, charged in expenses to "Cleaning houses." Excluded from Costs is a charge of $120 for Interest.

NMMA SURVEY OF MEMBER-GROWER RELATIONS: LIVE BIRD PRODUCTION COSTS: PERCENTAGE DISTRIBUTION

Member	Number of Growers 1973	Data Year	Payments to Growers	All Other Live Bird Costs	Cost of Chicks	Cost of Feeds
M 2	100	1973	10	90	10	75
M 3	13	1973	9.38	90.62	16.40	64.84
M 4	41	1973	8.33	91.67	12.67	69.73
M 5	100	1973	6.28	93.72	11.30	74.94
M 6	134	1971	16.0	84.0	17.0	60.0
M 7	76	1973	8.88	91.12	12.08	79.01[a]
M 8	NC	NC	NC	NC	NC	NC
M 9	216	1973	11.0	89.0	11.0	69.0
M 10	243	1973	8.5	91.5	9.6	76.4
M 11	113	1973	9.0	91.0	15.0	74.5
M 12	204	1973	10.8	89.2	11.3	73.4
M 13	122	1973	12.0	88.0	14.0	70.0
M 14	60	1973	8.28	91.72	12.12	79.56
M 15	113	1973	8.929	91.071	11.125	75.799
M 16	87	1973	10.49	89.51	13.78	66.72
M 17	39	1973	4.4	95.6	12.8	81.7[b]

NMMA SURVEY OF MEMBER-GROWER RELATIONS: LIVE BIRD PRODUCTION COSTS: PERCENTAGE DISTRIBUTION

Member	Number of Growers 1973	Data Year	Payments to Growers	All Other Live Bird Costs	Cost of Chicks	Cost of Feeds
M 18	99	1972	14.39	85.61	15.88	63.25
M 19	69	1973	9.57	90.43	13.0	75.35
M 20	90	1973	7.95	92.05	[c]	85.66[c]
M 21	92	1973	10.50	89.50	11.00	73.37
M 22	155	1973-74	9.48[d]	90.52	10.57	74.35
M 23	299	1973	11.2	88.8	10.7	71.0
M 26	36	1973-74	5.14	94.86	14.14	75.67
M 27[e]	1447	1973	11.24	88.76	12.47	66.93
M 29	212	1973	7.8	92.2	13.5	72.3
M 30	114	1973	11.5	88.5	11.45	69.86
M 31	235	1973	12.0	88.0	11.85	68.0
M 32	843	1973	11.6	88.4	12.2	71.7
M 37[f]	248	1973	10.14	89.86	12.64	70.27
M 38	133	1973	12.8	87.2	11.9	63.9
M 39	216	1973	9.88	90.12	13.76	70.50
M 41[g]	203	1973	11.40	88.60	11.51	70.91

NBMA SURVEY OF MEMBER-GROWER RELATIONS: LIVE BIRD PRODUCTION COSTS: PERCENTAGE DISTRIBUTION

TABLE G-6
Page 3 of 5

Member	Number of Growers 1973	Data Year	Payments to Growers	All Other Live Bird Costs	Cost of Chicks	Cost of Feeds
M 42	582	1973	8.94	91.06	12.83	71.03
M 44	104	1973-74	9.51	90.49	9.91	76.51
M 45	93	1973	5.9	94.1	6.3	71.4
M 46	222	1973	12.57	87.43	12.74	70.80
M 47	166	1973-74	10.32	89.68	12.67	66.80
M 48	103	1973	9.11	90.89	12.05	74.71
M 49	489	1973	9.1	90.9	11.8	72.3
M 50	262	1973-74	10	90	14	71
M 51	275	1973	9.99	90.01	10.90	72.89
M 52	60	1973-74	8	92	10	74
M 53	1050	1973	11.32	88.68	13.38	68.57
M 54	80	1973	10.6	89.4	16.4	66.0
M 55	103	1972	13.416	86.584	16.765	65.209
M 56	96	1973-74	7.8	92.2	11.0	77.0
M 57	293	1973	10.4	89.6	9.8	77.0
M 58	139	1973	10.3	89.7	11.1	70.9

NBMA SURVEY OF MEMBER-GROWER RELATIONS: LIVE BIRD PRODUCTION COSTS: PERCENTAGE DISTRIBUTION

TABLE G-6
Page 4 of 5

Member	Number of Growers 1973	Data Year	Payments to Growers	All Other Live Bird Costs	Cost of Chicks	Cost of Feeds
M 59	235	1973	11.6	88.4	12.0	71.0
M 60	481	1973	8.13	91.87	14.95	70.41
M 61	89	1973	9.0	91.0	11.0	75.0
M 62	634	1973	9.85	90.15	11.40	72.56
M 63	130	1973	10.97	89.03	14.23	71.12
M 64	275	1973-74	10.6	89.4	12.0	69.8

NOTES
Table G-6

KEY

NC = No contract; member grows all birds produced.

a. Includes cost of supervision of grower operations.

b. Includes cost of all vaccines, medicines and other health supplies.

c. Includes cost of chicks and all feeds.

d. Does not include patronage refund since none was made in 1973.

e. The company is a grower-owned cooperative with operations in seven separate geographic areas. The figures given for this company are unweighted averages of the figures submitted separately by each one of the seven operating units.

f. The member-company is composed of two cooperative members, each of which has a separate corporate identity. The figures given here for the member company are unweighted averages of the figures submitted separately by the two cooperative members.

g. The member-company is composed of three cooperative members, each of which has a separate corporate identity. The figures given here for the member company are unweighted averages of the figures submitted separately by the three cooperative members.

NFMA SURVEY OF MEMBER-GROWER RELATIONS:
TENURE IN MEMBER-GROWER RELATIONS, EFFICIENCY FACTORS, AND COMPETITION FOR GROWERS: 1973

Table G-7

Member	Number Growers 1973	Tenure Arrangements				Efficiency Factors Affecting			Competition for Growers			
		Contract Provisions		Informal Assurances							Growers Gained/ Lost Since 1970	
		Option to Renew	Conditions	Yes / No	Conditions	Tenure	Contract Payments	Measures	Existence of	Number Competitors	Gained	Lost
M 2	100	No		Yes		Yes	No	FC	Yes	2	40	NA
M 3	13	No		Yes	a	No	Yes	FC	No	0	0	0
M 4	41	No		Yes		Yes	No	NA	Yes	2	13	5
M 5	100	Yes	b	Yes	b	Yes	Yes	FC	Yes	4	7-10[b]	3-4[b]
M 6	134	Yes	c	Yes		Yes	Yes	CP	No	0	0	0
M 7	76	No		Yes		Yes	Yes	FC	No	0	0	3
M 8	NC	NC		NC		NC	NC	NC	NC	NC	NC	NC
M 9	216	Yes	d	Yes	d	Yes	Yes	CP	Yes	5	NA	32
M 10	243	Yes	gg	Yes		Yes	Yes	FC	Yes	6	NA	9
M 11	113	No		Yes		Yes	Yes	FC	No	0	0	0
M 12	204	Yes	e	No		Yes	Yes	FC,CP	Yes	4	59	22
M 13	122	Yes	f	Yes		Yes	Yes	FC	Yes	7	12	11
M 14	60	No		Yes		No	Yes	FC	No	0	12-15	0
M 15	113	No		Yes		Yes	Yes	FC	Yes	9	NA	NA
M 16	87	Yes	g	Yes		Yes	Yes	FC	Yes	6	8	0
M 1	39	Yes	f			No	Yes	FC	Yes	1	9	2

NBMA SURVEY OF MEMBER-GROWER RELATIONS:
TENURE IN MEMBER-GROWER RELATIONS, EFFICIENCY FACTORS, AND COMPETITION FOR GROWERS: 1973

Member	Number Growers 1973	Tenure Arrangements: Contract Provisions: Option to Renew	Tenure Arrangements: Contract Provisions: Conditions	Tenure Arrangements: Informal Assurances: Yes/No	Tenure Arrangements: Informal Assurances: Conditions	Efficiency Factors Affecting: Tenure	Efficiency Factors Affecting: Contract Payments	Efficiency Factors Affecting: Measures	Competition for Growers: Existence of	Competition for Growers: Number Competitors	Competition for Growers: Growers Gained/Lost Since 1970: Gained	Competition for Growers: Growers Gained/Lost Since 1970: Lost
M 18	99	Yes	h	Yes	h	Yes	Yes	FC	No	0	0	0
M 19	69	No		Yes		No	Yes	CP	Yes	4	22	15
M 20	90	Yes	i	Yes		Yes	Yes	FC	No[j]		15-20[j]	0
M 21	92	Yes	f	Yes	k	Yes	Yes	CP	Yes	4	NA	NA
M 22	155	No	l	Yes	l	Yes	Yes	FC	Yes	10	31	15
M 23	299	No	m	Yes	n	Yes	Yes	CP	Yes	6	25	35
M 26	36	Yes	o	Yes		Yes	Yes	FC	Yes	4	NA	NA
M 27	1447	No		Yes	p	Yes	Yes	CP	Yes	33	202	246
M 29	212	Yes	f	Yes		Yes	Yes	CP	Yes	5	NA	NA
M 30	114	Yes	q	Yes		Yes	Yes	FC	No		0	0
M 31	235	Yes	r	No		No	Yes	CP	Yes	6	40[s]	5[s]
M 32	843	No		Yes	t		Yes	FC	Yes	8	72	45
M 37	248	No		Yes		Yes	Yes	CP	Yes	13	30	9
M 38	133	No		Yes		No	Yes	FC	Yes	2	3	2
M 39	216	No		No		No	Yes	CP	Yes	4	73	29

NBMA SURVEY OF MEMBER-GROWER RELATIONS:
TENURE IN MEMBER-GROWER RELATIONS, EFFICIENCY FACTORS, AND COMPETITION FOR GROWERS: 1973

Member	Number Growers 1973	Tenure Arrangements: Contract Provisions: Option to Renew	Tenure Arrangements: Contract Provisions: Conditions	Tenure Arrangements: Informal Assurances: Yes/No	Tenure Arrangements: Informal Assurances: Conditions	Efficiency Factors Affecting: Tenure	Efficiency Factors Affecting: Contract Payments	Efficiency Factors Affecting: Measures	Competition for Growers: Existence of	Competition for Growers: Number Competitors	Competition for Growers: Growers Gained/Lost Since 1970: Gained	Competition for Growers: Growers Gained/Lost Since 1970: Lost
M 41	203	Yes	u	Yes	u	Yes	Yes	FC	Yes	18	81	9[v]
M 42	582	Yes	w	Yes		Yes	Yes	CP	Yes	6	175	53
M 44	104	No		No		No	Yes	FC	Yes	9	100	6
M 45	93	No		No		No	Yes	FC[x]	Yes	5	94	31
M 46	222	No		Yes		Yes	Yes	CP	Yes	5	21	22
M 47	166	Yes	f	Yes		Yes	Yes	CP	Yes	4	16	13
M 48	103	No		No		No	Yes	FC	Yes	2	5	0
M 49	489	Yes	y	Yes		Yes	Yes	CP	Yes	10	225	20
M 50	262	No		Yes	z	Yes	Yes	CP	Yes	3	0	26
M 51	275	Yes	aa	Yes	aa	Yes	Yes	CP	Yes	4	NA	NA
M 52	60	Yes	f	No		No	Yes	FC	Yes	2	100	20
M 53	1050	Yes	bb	Yes		Yes	Yes	CP	Yes	11	140	140
M 54	80	No	cc	Yes		Yes	Yes	FC	No	0	0	0
M 55	103	No	dd	No	dd	Yes	Yes	FC	Yes	2	21	12
M 56	96	No		Yes		No	Yes	FC	Yes	4	5	11

NBMA SURVEY OF MEMBER-GROWER RELATIONS:
TENURE IN MEMBER-GROWER RELATIONS, EFFICIENCY FACTORS, AND COMPETITION FOR GROWERS: 1973

Member	Number Growers 1973	Tenure Arrangements				Efficiency Factors Affecting			Competition for Growers			
		Contract Provisions		Informal Assurances							Growers Gained/ Lost Since 1970	
		Option to Renew	Conditions	Yes / No	Conditions	Tenure	Contract Payments	Measures	Existence of	Number Competitors	Gained	Lost
M 57	293	Yes	ee	Yes	ee	Yes	Yes	CP	Yes	4	40	7
M 58	139	Yes	f	Yes		Yes	Yes	CP	Yes	4	23	15
M 59	235	Yes	f	Yes		Yes	Yes	CP	Yes	2	7	1
M 60	481	No	ff	Yes		No	Yes	FC	Yes	6	48	43
M 61	89	No		Yes		Yes	Yes	CP	Yes	3	22	9
M 62	634	Yes	f	Yes		Yes	Yes	CP	Yes	3	NA	NA
M 63	130	No		Yes		Yes	Yes	FC	Yes	1	60	30
M 64	275	Yes		No		Yes	Yes	CP	Yes	5	9	9

KEY:

CP = Cost of Production
FC = Feed Conversion
NA = Not Available
NC = No Contract; Member grows all birds produced

a. As long as company is placing broilers.

b. Contract remains in force unless grower notifies the company one week before sale of flock, or unless the company notifies grower one week after the sale.

The figures for "Growers Gained/Lost" are for 1973 only.

c. Continuous contract until terminated by either the grower or the company by giving thirty days' notice.

d. Remains in force as long as mutually agreeable to the company and grower. "New house construction" contracts guarantee a minimum of twenty flocks.

e. Continuous contract until terminated by either the grower or the company. Contract expresses intention for grower to complete nine flocks every two years.

f. Continuous contract until terminated by either the grower or the company.

g. Contract remains in effect for successive batches of broilers, but may be cancelled because of poor grower performance.

h. Contract for "five batches per year, provided (the company) is not forced to cut back production due to economic situations beyond (its) control. Contract further provides that if grower fails to maintain company average feed conversion for "two broods in

four," contract may be terminated or company may put in replacement flocks at its discretion.

i. Continous contract. Payment rates may change according to economic conditions and market price.

j. The competition (six different companies) went out of business in the last two years, in bankruptcy or nearly so.

k. Contract recites that company is "more than glad to pay bonuses to top growers," but that "growers in the bottom bracket cost so much, it might mean that we will have to drop them."

l. Contract relationship lasts for at least two flocks. Grower may be terminated thereafter if his efficiency "falls in the lowest 25% of weekly settlements for two consecutive flocks, or three out of five flocks."

m. Contract specifies the delivery of replacement flocks from time to time subject to provision for termination by either party upon 30 days notice.

n. Growers are informally assured of replacement flocks as long as the company places flocks in the area.

o. Contract recites that it is "self-renewing," and provides for termination only in the event of breach.

p. Assured verbally that the company will continue to place flocks with growers unless they remain consistently in the bottom efficiency bracket.

q. Continuous contract unless terminated by either the grower or the company between batches.

r. Continuous replacement subject to general provisions for termination upon occurrence of specified events of default.

s. Since January 1, 1972.

t. If grower is below average, based on cost, for three flocks, he is put on probation for one flock, then dropped if performance on probated flock falls below average.

u. The member-company is composed of three cooperative members, each of which has a separate corporate identity. The contract of the first cooperative member is written for a single flock, but the member reported that the grower has an option to renew if his performance is satisfactory. The contract of the second cooperative member is for a five-year term, renewable after that from year to year by mutual agreement. The contract of the third cooperative member continues for seven years, after which it is renewable from year to year by mutual agreement. All three cooperative members stated that growers with satisfactory performance are assured of continued placements as long as the integrators are in business.

v. The member-company is composed of three cooperative members, each of which has a separate corporate identity. The first cooperative member had no information available for "Growers lost since 1970." The figure given is for the other two cooperative members.

w. New House Contract guarantees four batches per year.

x. A bonus is also paid to grower based on cost of production.

y. Continuous contract until terminated by the grower or the company. New House Contracts guarantee regular placements for twenty flocks.

z. If grower remains in lowest quartile consistently, the contract advises that he will be dropped.

NOTES
Table C-7

aa. Continuous contract until terminated by either the grower or the company. Grower is informally assured that as long as grower performs efficiently, he will continue to have birds placed with him.

bb. Contract is for one batch only, but is automatically renewed until cancelled by either the grower or the company.

cc. Contract for Environmental Control Houses covers twenty-five batches.

dd. Although the contract is written for a single flock, it provides that "any grower...in the lower 20% of their weekly selling group two times within any one year is subject to termination...".

ee. Contract is continuous, but may be terminated for "continuing poor performance and for non-compliance with company programs." The provision as applied means that a grower may be terminated if he is "in the lower 30% for three out of four batches."

ff. Contracts in use at two operating locations are automatically renewable. The contract used at the third operating location in a different geographic area is for one batch only.

gg. Contract automatically renews for successive flocks unless cancelled by either party after any flock. Contract sets out standards governing the company's decision in renewing, and in the timing of placement of renewal flocks, relating to insulation and equipment in houses and the individual grower's efficiency ranking among the company's growers.

NBMA SURVEY OF MEMBER-GROWER RELATIONS: ORDER OF PRIORITIES IN PROCEDURES FOR REDUCING CHICK PLACEMENTS TO ADJUST TO MARKET DEMAND

TABLE C-8
Page 1 of 5

Member	Number of Growers 1973	Extending Replacement Period	Skipping at Growers Option	Reducing Birds Per House	Reducing Replacements For Some	Terminating Some Growers	Other Methods
M 2	100	NA	NA	NA	NA	NA	
M 3	13	3	1	2	5	4	
M 4	41	1					
M 5	100	1					
M 6	134	1		1			
M 7	76	1					
M 8	NC	NC	NC	NC	NC	NC	
M 9	216	1					
M 10	243	1					
M 11	113		1				
M 12	204	1					
M 13	122	1					
M 14	60	1					
M 15	113	2	1			3	
M 16	87	1					

NBMA SURVEY OF MEMBER-GROWER RELATIONS: ORDER OF PRIORITIES IN PROCEDURES FOR REDUCING CHICK PLACEMENTS TO ADJUST TO MARKET DEMAND

TABLE C-8
Page 2 of 5

Member	Number of Growers 1973	Extending Replacement Period	Skipping at Growers Option	Reducing Birds Per House	Reducing Replacements For Some	Terminating Some Growers	Other Methods
M 17	39	1	2			3	
M 18	99	2	1				
M 19	69	1					
M 20	90	1	2	3	5	4	6[a]
M 21	92	2	3	4		1	
M 22	155	1	2		4	3	
M 23	299	1	3		2		
M 26	36	1		1			
M 27	1447	1	2	4		3	5[b]
M 29	212	1	2			3	
M 30	114	1					
M 31	235	1	2				
M 32	843	1	2				
M 37	248	2	1	3		4	
M 38	133	1					

NBMA SURVEY OF MEMBER-GROWER RELATIONS: ORDER OF PRIORITIES IN PROCEDURES FOR REDUCING CHICK PLACEMENTS TO ADJUST TO MARKET DEMAND

TABLE C-8
Page 3 of 5

Member	Number of Growers 1973	Extending Replacement Period	Skipping at Growers Option	Reducing Birds Per House	Reducing Replacements For Some	Terminating Some Growers	Other Methods
M 39	216	1					
M 41	203	1					
M 42	582	1	3	2			
M 44	104	2	1	5	3	4	
M 45	93	1		2		2	
M 46	222	1	2				
M 47	166	2	1		3		
M 48	103	1					
M 49	489	1				2	
M 50	262	1	2				
M 51	275	1					
M 52	60	1					
M 53	1050	1	2		4	3	
M 54	80		1				
M 55	103	1		2		3	

NEMA SURVEY OF MEMBER-GROWER RELATIONS: ORDER OF PRIORITIES IN PROCEDURES FOR REDUCING CHICK PLACEMENTS TO ADJUST TO MARKET DEMAND

TABLE G-8
Page 4 of 5

Member	Number of Growers 1973	Extending Replacement Period	Skipping at Growers Option	Reducing Birds Per House	Reducing Replacements For Some	Terminating Some Growers	Other Methods
M 56	96	1					
M 57	293	1	2				
M 58	139	1	2				
M 59	235	1					
M 60	481	1	1				
M 61	89	1					
M 62	634	1					
M 63	130	1	2			2	
M 64	275	1					

NOTES
Table G-8

Page 5 of 5

KEY:

NA = Not Available.
NC = No Contract; member grows all birds produced

a. No explanation of the "other method" was given.

b. One out of the company's seven operating units reported skipping one cycle with 10% of those growers who had the highest costs.

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF FORD BARRETT

(Filed May 1, 1975)

State of Georgia
County of Forsyth

I, Ford Barrett, after first being duly sworn, on oath depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 3, Cumming, Georgia 30130.

4

I started raising chickens about 35 years ago. I started out raising chickens on my own, without any contract. I had small houses then and a feed dealer would sell me feed and chicks. The feed dealer would also market my chickens; I have never tried to market chickens on my own. If the chickens did not

bring enough to pay my bills at the feed dealer, I would end up paying him out of my pocket.

5

When I was raising my own chickens, I made a little money overall, but I also lost money at times.

6

I have been a contract grower of chickens for about 21 years. When I started as a contract grower, I was paid 2 cents per pound regardless of what the market price was. I also received a portion of any proceeds that were left after the feed dealer recovered his costs plus a margin of profit.

7

All of the integrated producers or feed dealers I have grown for have guaranteed me a flat rate per pound.

8

I have been a grower for several different feed dealers or integrated producers over the past 21 years, largely because they kept going broke. I first was a contract grower for someone named Martin. He went broke. The second person I grew for was Frank Vaughan. He went broke. The third was Clyde Pendley. He went broke too. The fourth was Ralton Purina Company. It didn't go broke, but it got out of the chicken business.

9

I have never had any trouble getting new flocks to grow-out—even when the integrated producers I grew for went out of business.

10

I have grown for A. C. Smith Poultry Company for the last 9 years. I have never had any trouble getting chicks and I

enjoy growing with A. C. Smith. Pillsbury came out here looking for contract growers, but I wouldn't switch from A. C. Smith. I have had no cross words in 9 years with A. C. Smith or his people.

11

A. C. Smith guarantees me 2 cents per pound. If the broiler market is high and if my feed conversion is all right, I get more than 2 cents per pound. Two cents per pound more than pays my costs. My wife and I make a good living on 2 cents per pound.

12

Eighteen years ago, I had 2 chicken houses, with capacities of 5,000 and 3,000 birds respectively. I still use the 5,000 bird house and I now have 3 newer houses, which I built approximately 11 years ago. Two of the 11 year old houses have 10,000 bird capacities and 1 has a 6,800 bird capacity. The individual capacities are approximations; my maximum total capacity for my 4 houses is 33,000 birds. A. C. Smith places chicks in all 4 houses at the same time.

13

Ralston Purina Company convinced me, when I was still growing for them, to increase my capacity by building the 3 new houses.

14

I estimate that the 3 houses constructed 11 years ago cost approximately $25,000.00 to build and to equip.

15

I borrowed the money to build those 3 houses from the Federal Land Bank. I borrowed more money from the Production Credit Association to insulate the houses. Then I borrowed from a

bank for 1 automatic feeder and from the Federal Land Bank for another. I paid off all of these loans completely over a 10 year period.

16

I own a total of 7 acres of land, 5 of which are devoted to growing broilers.

17

I settle an average of 4 and ½ flocks per year, and I have settled 5 flocks each year for the last 2 years.

18

A. C. Smith is good about putting the flocks back into my houses. There is a maximum of about 3 weeks between flocks, but the period between flocks actually averages out to about 10 days to 2 weeks generally.

19

A. C. Smith is the one who takes the big risk. A. C. Smith Company has the big investment—the Company has money invested in the birds, the feed, the medicine, the trucks and other facilities and equipment, and they're the ones who will lose if the chickens smother or die from disease.

20

I am all paid out on my capital investment. I am not going to lose nearly as much as A. C. Smith. All I would lose would be the value of my work and my out-of-pocket fuel costs should a flock die. A. C. Smith would be the big loser, not me; he is putting more dollars into my growout operation than I am. He has got a lot of money tied up, just in the price of feed and chickens for example.

21

A. C. Smith has made for me what I have. Without A. C. Smith or other integrated producers, I simply could not be in the chicken business. A. C. Smith has been a good friend. He has had bad times and lost lots of money, but he has always paid me my guaranteed contract payment. A. C. Smith Company continued placing chickens with me when the chickens were bringing 9 cents per pound farm level; 9 cents per pound, and yet he was still paying me 2 cents per pound. If anyone is going to lose something in the grow-out phase, A. C. Smith is the one who is going to lose it.

22

A. C. Smith has the biggest costs. He pays for the chicks, the feed, the feed and cooping trucks, the medicine and his employees who supervise the grow-out operation. He's the one with the overhead expense. A. C. Smith even pays for the catching and cooping of the birds. I have nothing to do with catching and cooping the chickens.

23

From December through mid-May, A. C. Smith helps pay my heating or fuel costs. He paid me close to $800.00 for fuel for the last two flocks. This fuel allowance is over and above my guaranteed payment and any additional market and efficiency payments.

24

The loans on my chicken houses had 20 year terms. I paid them out in 10 years, plus bought some land, a new car, a new pick-up or two, and my family and I have had plenty to eat. A. C. Smith keeps chickens in our houses and, if the price drops, he loses. If the price goes up, I win.

25

My capital investment is paid out and my houses are insured. My only risk in growing chickens is the value of my labor plus

that portion of my fuel costs not reimbursed by A. C. Smith. I hire very little labor, and I wouldn't count the cost as significant at all.

26

In 1973, I settled 5 flocks with A. C. Smith, and I received gross payments totalling $12,270.61.

27

In 1974, I settled 5 flocks with A. C. Smith and I received gross payments totalling $12,171.01.

28

My 1974 expenses in connection with my broiler growing operation were as follows:

Item	Annual Cost
Fuel	$3,540.00
Electricity	240.00
Insurance	440.00
House and equipment upkeep and maintenance	592.50
Hired labor	180.00
Shavings (litter)	620.00
Taxes	270.65

All water expenses are included in the electricity expense. The tax figure includes property taxes and ad valorem taxes.

The shavings expense shown above is partly recovered when the litter and shavings are removed from my houses. Because the litter and shavings are valuable as fertilizer, people remove them from my houses at no cost to me, simply to get the fertilizer. I therefore view the shavings expense shown above as being partially offset by my avoiding entirely the expense and labor which would otherwise be required to remove the shavings and litter.

29

For tax and bookkeeping purposes, my broiler houses are totally depreciated. My 3 newer houses were depreciated out over 10 years at a rate of $4,000 per year per house. I have from time to time had to replace equipment used in my houses, such as side curtains and automatic feeders. This equipment is depreciated on a straight line basis over varying lengths of time, depending on the type of equipment. My total depreciation expense for 1974 was $1,830.07.

/s/ FORD BARRETT

Sworn to and subscribed before me this 21 day of April, 1975.

MARY CASTLEBERRY
Notary Public

Notary Public State of Georgia, Forsyth County

My term expires 8-10-76

In the United Statees District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF J. TROY COPELAND

(Filed May 1, 1975)

State of Georgia
County of Habersham

I, J. Troy Copeland, after first being duly sworn, on oath depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 2, Clarkesville, Georgia 30523.

4

I first got in the chicken business in 1942 or 1943. I started out buying chickens and trying to market them myself. Sometimes I could sell them, and sometimes I couldn't.

5

Some time in the mid 1940's, I began growing chickens on contract for Jesse Jewell. I do not recall the details of my relationship with Jewell.

6

After the second World War, I began growing for Tom and Lee Arrendale, then operating as Arrendale's Feed Store. It is my recollection that growers were on their own as far as the risk was concerned, and the Arrendales sold us feed and chicks and would try to find a market for us. At that time there was no guarantee of any payment or market.

7

In 1951, I went completely on my own again, producing and marketing chickens myself. I only did that for about a year, and I realized that I just couldn't do it on my own.

8

Trying to do it without a contract program, you get everything you own tied up into it, and then watch it fall apart. The chickens could get a cold, or get sick in some way, and it was possible to lose them all. Furthermore, it wasn't an everyday business, since it took about 9 weeks or so to raise the chickens and you could only come to market once every 9 weeks. Sometimes you could make something, sometimes you couldn't.

9

After a year of trying it on my own, I started back growing on contract with the Arrendales. In about 1952, the Arrendales began guaranteeing a payment of $60 per 1,000 birds sold.

10

I have been growing on contract ever since then with the Arrendales, whose integrated broiler operation is now owned and operated as Fieldale Corporation.

11

I now have 6 broiler houses, with a total capacity of 106,000 birds per cycle. Two of the houses were built in 1963, two in 1964 and two in 1966.

12

Construction and equipping of all my houses were financed through the Bank of Habersham, where Tom Arrendale is Chairman of the Board.

13

All of my houses were built by contractors. I had to borrow approximately $98,000 to construct and equip the 6 houses, and I borrowed all of it from the Habersham Bank. Tom Arrendale just told me to come to the bank. the money was ready for me.

14

My houses are situated in two separate locations. One location has three houses with a combined capacity of 50,000 chickens, and the other location has three houses with a total capacity of 56,000.

15

My family and I provide all the labor for the growout operation at one location, and I have a hired couple looking after the other location. I furnish the hired couple a dwelling house and $80 per week salary.

16

My total farm covers 237 acres. Of that, 5 acres would take care of all the broiler growing operation. Except for 50 acres planted in commercial timber, the rest of my acreage is in pasture.

17

I also raise angus beef cattle, and I currently have 158 head. I have to buy everything that goes into the cattle raising, and I take all of the risk involved in producing and marketing the cattle.

18

I sell my cattle at auction, and I haven't been making any money off of them. It requires a herd of about 400 head before you can begin to make any money.

19

I have made money on just about every flock of chickens I have grown for the Arrendales, and I have never lost money on any flock.

20

I feel sure I will get replacement chickens so long as Fieldale is in business. I have been associated with the Arrendales for about 25 years, and I have always gotten chickens on a regular basis. For the past 4 or 5 years, I have settled 5 flocks every year.

21

The minimum 2.60 cents per pound guaranteed by Fieldale would be adequate to cover out-of-pocket costs, labor and some profit. I have always made a good bit more than the minimum payment, however.

22

Fieldale bears the major risk in connection with the broiler growout, because they own the chickens and the feed. The only thing I risk might be my labor.

23

I could not have stayed in broiler production if the Arrendales had not started their contract program with the guaranteed payment. Without the program, I couldn't have gotten my money back out, and I doubt that the Arrendales could have gotten the growing houses built back in the 1950's if they hadn't been guaranteeing payments.

24

In 1974, I settled 5 flocks out of both locations, for a total gross payment of $55,055.77.

25

My estimated operating expenses for 1974 were as follows:

Item	Annual Cost
Fuel	$11,878.70
Electricity	2,922.11
Hired labor	4,160.00
Insurance	1,432.63
Shavings	3,300.00
Building and equipment upkeep and maintenance	2,000.00
Taxes	2,427.44

All water expense is included in the electricity expense.

The shavings expense is offset in large part by the fact that I use all of the chicken manure and litter on my pasture as fertilizer.

Total repair and maintenance expense for my entire farm during 1974 was $2,417.81 and I estimate that about $2,000.00 of that was attributable to the broiler growing operation.

The tax expense shown above is the total amount of tax I paid in 1974 attributable to my farm income, including cattle production and property tax on 237 acres, of which no more than 5 acres is devoted to broiler growing.

26

For tax and bookkeeping purposes, I am depreciating all 6 of my chicken houses, and the equipment in 4 of them, over a period of 15 years on the straight line method. I am depreciating the equipment in the other 2 chicken houses over a period of 8 years on the straight line method. The total depreciation expense for these assets in 1974 was $9,680.75.

/s/ J. TROY COPELAND

Sworn to and subscribed before me this 8th day of April, 1975.

/s/ BAYARD M. ROPER, JR.
Notary Public

My Term Expires July 7, 1977.

In the United States District Court
For the Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF KIRK H. DAVIS

(Filed May 1, 1975)

State of Georgia
County of Habersham

I, Kirk H. Davis, after first being duly sworn, on oath depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 1, Clarkesville, Georgia 30523.

4

I have been growing broiler chickens since 1954 on contract with Tom and Lee Arrendale and what is now Fieldale Corporation.

5

I built my first broiler house in 1954 on my mother's farm. The house was built from timber cut on the farm. It was an open house with curtained windows, and had a capacity of 8,000 birds. I installed a running water system in the house, rechanneling water from a spring on the land. Arrendale Feed Store sent some of their people up to help install the water system, and also to install the oil pipes which supplied oil to the oil brooders (heaters).

6

Tom Arrendale also selected and purchased the brooders and the feeding equipment for me, and I paid him back sometime later.

7

The total cost of the original house and equipment was a little more than $4,000.

8

At the time I built my first house, the Arrendales guaranteed a payment of $50 per 1,000 chickens sold, and I was able to make enough money back to pay for the house and equipment completely the year after I built it.

9

At the time I built my first house, the Arrendale contract program worked as follows: the Arrendales would deliver the chicks and feed, and bill them to me on account at prices which would give them a profit on the chicks and feed. At the

end of the growout, the Arrendales picked up the birds and sold them to a processor. Gross receipts from sale of the birds was first applied to my account, paying for the chicks and the feed. I got all profit on the sale of the chickens after payment for the feed and chicks.

10

Under the contract I couldn't have any loss, because the Arrendales guaranteed $50 per 1,000 regardless of the live bird price when they were sold.

11

In 1958 I went into business with my uncle, who owned another farm. My uncle built two chicken houses on the farm, and I furnished all the labor to grow out the chickens under the contract with the Arrendales. My uncle and I had an arrangement whereby we would share the grower payments.

12

At the time I was growing chickens with my uncle, I also owned my present farm and raised hogs, cattle and some row crops.

13

Once during the period when I was growing chickens with my uncle, half of one of the houses burned down, and about 10,000 four-week old chickens we were growing under contract for the Arrendales were killed.

14

Even though their chickens were lost, the Arrendales paid us enough to cover costs. At the time of the fire, the chickens were about half-grown. We had been averaging about $80 per 1,000 in payments, and I believe they paid us $40 per 1,000 on the chickens destroyed in the fire.

15

I built my present chicken houses on my farm in 1966. The cost of the two houses, which have a combined capacity of 36,000 birds per cycle, was around $46,000, which included grading and road building costs, the buildings and all equipment. The buildings have a useful life of at least 20 years, and the equipment should last at least 8 or 10.

16

My farm consists of 175 acres in all. Of this, no more than 4 acres are devoted to the raising of broilers including the roadways and all other land tied up in the broiler operation.

17

In addition to broiler growing, I also breed and raise cattle, which I sell as feeder calves at auction.

18

I buy everything that goes into the cattle operation myself, and I take all of the risk in producing cattle and in marketing them.

19

The only risk I face in broiler growing is that something could happen to Fieldale and they could go bankrupt.

20

Fieldale owns the flock, and my chicken houses and equipment are all insured.

21

The only thing I stand to lose on my flock is my labor and my fuel and litter bill. There is really no way I can lose that, unless I don't manage the chickens the way I am supposed to.

22

I have never lost money on a flock since I have been growing chickens under contract with the Arrendales.

23

I have always gotten replacement flocks on a regular basis, and I feel like I will continue to get chickens as long as Fieldale is putting them down. I know that they have a lot of money invested in the broiler business, and people don't do that unless they plan to stay in business.

24

The minimum payment of 2.60 cents per pound now guaranteed by Fieldale Corp. would more than cover my costs involved in the growout. I have never been paid the minimum, however, and my payments are usually substantially better than the minimum amount guaranteed.

25

There is no live market for broiler chickens today, and I could not raise chickens if there were no contract growing program.

26

Contract growing is much better for the little fellow. A person like me couldn't stand the risk—one loss could wipe me out.

27

If I could no longer grow chickens under contract, I would have to look for some off-farm employment. My fields are too small for row-cropping, and there is no incentive to expand my cattle business, with cattle prices being what they are today.

28

I do most of the work in connection with the growout myself. I need some help when a flock is first put in, and also after the pickup when we clean out the house. I hire somebody for a total of about 10 days for each cycle. At 5 flocks per year, and at $16 per day, my total hired labor expense runs about $800 per year.

29

In 1974, I settled 5 flocks with Fieldale, and I received gross payments totaling $21,541.00.

30

I estimate my current annual expenses in connection with my broiler growing operation as follows:

Item	Annual Cost
Fuel	$1,613.39
Electricity	900.00
Insurance	451.20
House and equipment upkeep and maintenance	400.00
Hired labor	800.00
Shavings (litter)	1,200.00
Taxes	Unknown

All water expense is included in the electricity expense.

The shavings expense shown above was offset at least in part by the fact that the litter and chicken manure taken from clean-up of the house was spread on my pasture as fertilizer. I don't know how to calculate the total value of the chicken litter and manure, but I do know that it out performs commercial fertilizer on pasture land.

My total combined ad valorem and property taxes for all buildings and all 175 acres on my farm was $1,065.87. I do not know what part of that was attributable to land, buildings and equipment used in broiler growing.

31

For tax and bookkeeping purposes I am depreciating my broiler houses on the straight line method over a period of 10 years, at the rate of $3,293.50 per year. I am depreciating the equipment on the straight line method over a period of 8 years, at the rate of $1,344.56 per year. Thus, my total depreciation expense for 1974 was $4,638.06.

/s/ KIRK H. DAVIS

Sworn to and subscribed before me this 8th day of April, 1975.

(Illegible)
Notary Public

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF DR. VERNER G. HURT

(Filed May 1, 1975)

State of Mississippi
County of Oktibbeha

I, Verner G. Hurt, after first being duly sworn, on oath depose and say the following:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment in this action.

2

My residence is 702 Cottonwood Drive, Starkville, Mississippi 39759.

3

I am presently employed as Department Head, Department of Agricultural Economics, Mississippi State University, and have held the position of Department Head since 1972. I have been a member of the faculty of the Department of Agricultural Economics at Mississippi State University since 1956, at which time I joined the Department faculty, with the exception of a two year period, 1958-1960, during which I was a Research Assistant in the Department of Agricultural Economics at Oklahoma State University.

4

As Department Head, I have supervisory responsibility for all the teaching and research functions of the Department of Agricultural Economics, including research in connection with broiler production and marketing.

5

I received my Bachelor of Science degree from Mississippi State University in 1950. I received my Master of Science degree in Agricultural Economics from Mississippi State University in 1955. I received my Ph. D. in Agricultural Economics from Oklahoma State University in 1961. I completed post-doctoral work at the NSF Institute on Mathematics of Optimization, University of Missouri, in 1965.

6

In my capacity as an agricultural economist at Mississippi State University and as a consultant in agricultural economics I am familiar generally with the organization of the broiler industry and the management of broiler production and also with marketing and pricing practices in the industry.

7

The broiler industry has been almost completely integrated vertically for many years. Integrated broiler production includes raising and breeding of breeder flocks to produce eggs for hatching as broiler chicks, hatching of broiler eggs and placement of broiler chicks, raising of broiler chicks for a period of seven to nine weeks, catching, cooping and hauling live birds to processing facilities, and processing and preparation of the birds as ready-to-cook (RTC) broilers.

8

The management of broiler production is carried on almost exclusively today by integrated producers, who combine breeder flocks, hatcheries, feed manufacturing facilities, broiler flocks, processing plants and distribution facilities under one ownership or management system. More than 95% of the broilers marketed in the United States are now produced by integrated producers.

9

Integrated broiler producers accomplish the growout of their broiler chickens (raising the chickens from day-old chicks to seven-to-nine-week-old chickens) either through hired labor on company owned farms or through contractual arrangements with independent contractors, known as growers, whereby the contracting growers provide facilities and labor necessary to care for the chickens for the growout period as determined by the integrator.

10

At all times during production, the integrated producer owns the broiler flock, the feed, medicines and vaccines and most other supplies essential to the production of a marketable broiler.

11

Although the individual grower can decide whether or not to contract with a particular integrated producer, once a contract growing relationship is entered substantially all decisions with respect to both production and marketing of the broilers produced under contract are made by the integrated producer.

12

Integrated producers make all decisions with respect to the overall number of broilers to be produced or brought to market at a given time, because the integrated producer can determine the number of chicks to place and the number of growers with whom he desires to contract. Thus, substantially all decisions with respect to the number of broilers scheduled for production and marketing are made by integrated producers.

13

Integrated producers, who usually own hatcheries, breeder farms, feed manufacturing facilities and/or processing facilities, have a substantial investment in land, buildings and equipment devoted to the production of RTC broilers from the breeder flock stage through the processing and marketing stage.

14

In addition to land, buildings and equipment, the integrated broiler producer has a substantial investment in breeder flocks, hatching eggs, chicks, feed, feed ingredients, medicines, vaccines and health supplies invested in broiler production.

15

The contract grower's risk of investment in broiler production is limited to the value of his investment in his labor, his broiler houses and equipment, utilities such as fuel and electricity for the broiler houses, and occasionally certain other supplies such as litter.

16

Broiler growers have no investment in any phase of broiler production other than the growout phase.

17

The grower's investment in farm land devoted specifically to the raising of broilers is not substantial compared to other agricultural production, because the land requirement is limited to the land underlying and immediately adjacent to the grower's broiler houses and the area required for a roadway to the houses.

18

Production contracts between integrators and growers are essentially labor contracts together with a fee for the use of the grower's facilities and what little land is involved.

19

In the actual operation of contract broiler production, practically all of the risk of loss is transferred to the integrator, because the grower is generally guaranteed a minimum payment which is adequate to cover his fixed costs, his out-of-pocket expenses and some or all of his labor.

20

Broiler integrators supply inputs accounting for between 85% and 95%, depending on the individual contract, of the live bird cost including feed, chicks, medications, veterinary supplies and services, growout supervision and some labor involved in catch-

ing, cooping and hauling. A 1967 study, the results of which were reprinted in USDA Economic Research Service Marketing Research Report No. 930, p. 8 (May, 1971), showed the following typical percentage distribution of broiler production costs:

	Percent
Feed	62.4
Chicks	19.2
Grower payment	12.0
Fuel	2.0
Medications	1.6
Vaccination	1.2
Litter	.8
Miscellaneous	.8

Since the time of the study, feed costs have increased substantially and in 1974 accounted for approximately 70% of the live bird production cost. Data published by USDA in Poultry & Egg Situation, March, 1975 (PES-285), at Table 2—Estimated Production Cost, Total Cost, and Net Returns for Broilers, 1972-1974 a copy of which is attached hereto, shows the 1974 annual average total estimated live bird production cost to be 22¢ per live weight pound, of which 15.8¢ (approximately 72%) was accounted for by feed. The higher feed cost alters the percentage distribution to increase the percentage accounted for by feed and chicks, reducing the percentage accounted for by other inputs including grower payments. Currently, payments to growers account for approximately 10% of the live bird production costs incurred by integrators.

21

Payments made to growers by integrators represent an amount adequate to cover all costs accounted for by the growers, including fixed costs, out-of-pocket expenses, and labor (or profit, if hired labor is used by the grower). Thus the remaining

88% to 90% of the live bird production cost is accounted for by inputs supplied entirely by the integrator.

22

As the attached Table 2 indicates, the live bird production costs account for little more than half of the total wholesale cost of producing the ready-to-cook broiler, the form in which the broiler is first sold in the open market. All of the production costs beyond the live bird costs represent investments made by the integrator in producing the marketable broiler.

23

The broiler integrator is the principal risk-bearer in broiler production, because the integrator supplies inputs accounting for most of the production costs and has no guarantee of any return when he sells the product on the open market. The grower's main risk is that the integrator with whom he contracts will go out of business.

24

Although many contracts are written for only one flock, growers of at least average efficiency are assured by custom and practice of regular placement of chicks by the broiler integrators with whom they contract. Continuity of production makes continuing relations with growers a practical necessity.

25

Integrated broiler production has developed in areas of limited alternative agricultural enterprise and has replaced or supplemented incomes derived by rural families from other agricultural sources, such as cotton and truck farming. Had it not been for the development of integrated broiler production, our farm population today would be considerably less than it is.

26

The RTC broiler market in which the integrated broiler producer sells has all the characteristics of the typical agricultural market: the product is perishable and is produced through a biological process; once production is committed, the producer must either sell his product or destroy it; pricing is characterized by volatility and instability, a characteristic which is harmful to both producers and consumers; and the product is distributed through middlemen intervening between the integrated producer and the consumer.

27

The key production decisions affecting placement of breeder chicks, setting of broiler eggs in hatcheries and placement of day-old broiler chicks for growout must be made by integrated producers well in advance of the marketing period for broilers produced. These decisions, which control the number of birds arriving on the market at a given date, must be made by the integrator with no knowledge of the demand which will exist for his product when it reaches the market except for historical patterns and trends.

28

Historical patterns and trends in demand are frequently modified by unanticipated and unforeseeable occurrences, such as retail price specials, fluctuations in retail prices for beef and pork, labor strikes, weather conditions, etc.

29

A retailer's decision to feature broilers during a given week, for example, can double consumer demand for broilers during the feature week, and substantially reduce demand below normal during the week or weeks following such a feature. Integrated producers of broilers cannot anticipate the timing of feature activity by retailers in their production planning.

30

Nearly 90% of all federally inspected RTC broilers are sold fresh, in ice pack or chilled (non-frozen) form. In commercial practice, ice-packed and chilled broilers must be sold to the ultimate consumer within seven to ten days of slaughter. Because of this limited shelf life, broiler integrators must sell all their fresh product within a maximum of four days from time of slaughter.

31

Birds which are not slaughtered when they reach marketable size continue to increase in weight beyond desirable levels. The normal demand for RTC broilers at wholesale is confined to birds ranging in weight from approximately 2 to approximately 3½ pounds dressed weight. Birds which substantially exceed this weight in the integrated producer's inventory must normally be sold at a discount below the prevailing market price for desirable weight birds.

32

Violent swings in day-to-day or week-to-week purchases create substantial problems for producers of agricultural products, and create particular problems for the broiler industry. The product is perishable; it has to be moved in a relatively short period of time and cannot be stored and held, and the production process for broilers is such that the flow of product cannot be varied substantially from day to day once the decision has been made to produce at a certain rate over time.

33

Achievement of healthy production and orderly marketing of broilers will require effective production planning and price discovery by broiler integrators. The broiler industry has a capacity for production to meet peak demand, which exceeds the normal demand existing during a substantial portion of

the year, and broilers must frequently be sold by integrated producers at prices below their cost of production.

/s/ VERNER G. HURT

Sworn to and subscribed before me this 2nd day of April, 1975.

(Illegible)
Notary Public

My Commission Expires November 10, 1978.

Table 2—Estimated production costs, total costs, and net returns for Broilers, 1972-74[1]

Period	Production costs		Total wholesale ready-to-cook costs[2] [3]	9-city weighted average broiler price[3]	Net returns[2] [3] [4]
	Feed[3]	Total[3]			
	Cents per pound liveweight		Cents per pound liveweight		
1972					
1st quarter	8.3	13.6	27.2	27.8	0.6
2nd quarter	8.8	14.2	28.0	27.2	-0.7
3rd quarter	9.2	14.6	28.5	29.6	1.1
4th quarter	9.7	15.0	29.2	28.0	-1.2
Annual average	9.0	14.3	28.2	28.3	0.1
1973					
1st quarter	12.2	18.0	34.0	37.0	3.0
2nd quarter	14.2	20.1	36.9	42.2	5.4
3rd quarter	21.2	27.0	46.5	52.8	6.3
4th quarter	17.6	23.4	41.5	37.2	-4.3
Annual average	16.4	22.2	39.8	42.4	2.6
1974[4]					
1st quarter	16.1	22.3	40.5	39.3	-1.2
2nd quarter	15.2	21.3	39.2	35.3	-3.9
3rd quarter	14.5	20.7	38.3	37.6	-0.7
4th quarter	17.7	23.8	42.6	40.4	-2.3
Annual average	15.8	22.0	40.1	38.0	-2.0

[1] Based on secondary data and incomplete data from survey. Estimated by computerized formula. [2] Weighted by monthly broiler slaughter. [3] Based on farm cost converted to wholesale market values for ready-to-cook broilers. [4] Preliminary. [5] May not add across due to rounding.

Table 3—Estimated production costs, total costs, and net returns for Turkeys, 1972-74[1]

Period	Production costs		Total wholesale ready-to-cook costs[2] [3]	New York heavy young hen turkey price[3]	Net returns[2] [3] [4]
	Feed[3]	Total[3]			
	Cents per pound liveweight		Cents per pound ready-to-cook		
1972					
1st quarter	11.9	18.9	32.2	36.9	4.7
2nd quarter	12.9	19.9	33.3	34.8	1.4
3rd quarter	13.5	20.5	34.1	35.3	1.2
4th quarter	14.1	21.1	34.9	38.5	3.7
Annual average	13.5	20.5	34.1	36.6	2.8
1973					
1st quarter	15.4	22.9	37.8	45.1	7.3
2nd quarter	19.8	27.3	43.3	55.9	12.6
3rd quarter	27.0	34.5	52.3	69.2	16.9
4th quarter	28.2	35.7	53.8	67.2	13.4
Annual average	25.6	33.1	50.6	64.5	13.9
1974[4]					
1st quarter	22.1	30.3	48.4	49.9	1.6
2nd quarter	23.6	31.8	50.2	39.2	-11.0
3rd quarter	19.9	28.1	45.6	45.6	-0.1
4th quarter	24.8	33.0	51.7	52.1	0.4
Annual average	22.5	30.7	48.8	47.0	-1.8

[1] Based on secondary data and incomplete data from survey. Estimated by computerized formula. [2] Weighted by monthly turkey slaughter. [3] Based on farm cost converted to wholesale market values for heavy young turkey hens. [4] Preliminary. [5] May not add across due to rounding.

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF RICHARD C. LARKIN

(Filed May 1, 1975)

State of Georgia
County of Fulton

I, Richard C. Larkin, after first being duly sworn, on oath depose and say the following:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is 200 North Jackson Street, Arlington, Virginia.

4

I am currently employed by National Broiler Marketing Association on a consultant basis as Director of Economic Research.

5

I received a Bachelor of Science degree and a Master of Science degree in Agricultural Economics, both from North Carolina State University in Raleigh, North Carolina.

6

Upon receipt of my Masters degree, I joined the Soil Conservation Service of the United States Department of Agriculture (USDA) in Raleigh working on an experimental project which involved analyzing farm records to test the economic practicality of various soil conservation projects.

After a year with the Soil Conservation Service, I spent a year with the War Production Board as an economist dealing in the allocation of ferro alloys.

7

I next spent two years with the Office of Price Administration analyzing and preparing ceiling prices for eggs, chickens and turkeys.

8

In 1946, I was employed by the Poultry Division of USDA. I left USDA in 1947 to work for a year as assistant to the manager of a farmers mutual exchange in Durham, North Carolina, operated by an agricultural cooperative which included eggs and broilers in its production and marketing.

9

In 1948, I returned to USDA and was employed in the Poultry Division until my retirement in February of 1971.

10

Upon my retirement from USDA, I was employed by NBMA on a consultant basis as Director of Economic Research.

11

I have been a member of the American Farm Economic Association, and I have received various merit awards from USDA including a substantial cash award which I received for my work in developing USDA's least cost procurement program in connection with the procurement of broilers and turkeys.

12

During my employment with USDA, I served in various capacities as an economic advisor to the Director of the Poultry Division. Among my responsibilities during my employment with the Poultry Division were program analysis, responsibility for poultry procurement for the school lunch program, responsibility for surplus removal purchase programs, and responsibility for the preparation of marketing guides with respect to broilers, turkeys and eggs.

13

Nearly all of my career with the Poultry Division of USDA involved me in analysis of supply and demand conditions and price trends in the poultry area.

14

One of the purposes of the school lunch program, surplus removal purchase programs and publication of marketing guides with respect to agricultural products is and always has been to prevent and control surpluses in any agricultural commodity and to promote orderly production and distribution of such commodities, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity. This congressional policy, under which USDA and the Poultry Division have operated, is declared, among other places, in the Agricultural Marketing Act of 1929 (12 U.S.C. § 1141[a][4]).

15

During my employment with USDA, stability of price and production levels in the broiler industry was always recognized as being to the advantage of both the producer and the consumer, and the Broiler Marketing Guides were developed and published with the intention of recommending to the broiler industry a level of production which would result in prices which over time would stabilize production and eliminate violent year to year changes in both price and production levels.

16

The USDA Broiler Marketing Guides were first published in 1969, and publication of the guides was continued through the second quarter, 1973 issue. Thereafter, the title of the series was changed to "Broiler Marketing Facts", and the production level recommendations, which were made in the Broiler Marketing Guides, were discontinued.

17

The Broiler Marketing Guides were prepared under my supervision in the Poultry Division of USDA. Other USDA units also participated, including the Statistical Reporting Service, the Economic Research Service and the Extension Service.

18

The Broiler Marketing Guides were published quarterly, and most issues recommended a cutback or increase in production by the broiler industry. The marketing guide recommendations were intended to be meaningful and realistic recommendations which would produce a level of production calculated to generate prices at levels which would ensure stability of production over all.

19

The Broiler Marketing Guides were designed for assistance to, and implementation by, integrated broiler producers.

20

There is no significant live market for broiler chickens today, and nearly all broilers are first sold on the open market in processed, ready-to-cook (RTC) form by integrated broiler producers. At least 95% of the broilers marketed in the United States in recent years have been produced by integrated producers.

21

Integrated broiler producers, or "integrators", are firms which manage the production of broilers from the breeder flock stage through processing and marketing RTC broilers, owning or otherwise controlling breeder flocks and hatcheries, feed mills or other feed supply sources, and facilities for processing and marketing RTC broilers.

22

The growout phase (raising the chickens from day-old chicks to 7 to 9 weeks old chickens) is accomplished in most cases through contractual arrangements with independent contractors, known as growers, under the direction and control of the integrators. The integrators own the chickens and supply all feed, medication and most other essential supplies, while the growers provide facilities and services necessary to care for the chickens as prescribed by the integrator.

23

Commercial broiler production as we know it today is largely a post-World War II phenomenon. During the period since World War II, as integrated production and contract growing developed in the southeastern United States, the production of broilers in the United States increased from less than 1 billion to more than 11 billion pounds. ("Egg and Poultry Statistics June 1957"), USDA Agricultural Marketing Service, Statistical Bulletin No. 249 (May 1959) [Table 7.8]; "Poultry and Egg Statistics Through 1972", USDA Economic Research Service,

Statistical Bulletin No. 525, [January, 1975] [Table 16]; "Chicken, Eggs and Broilers: Production, Disposition, Cash Receipts and Gross Income, 1972-1973 by State", USDA Statistical Reporting Service, Crop Reporting Board, Pou 2-3[74] [April 1974] [p.10]).

24

The development of commercial broiler production came about at the initiative of integrated producers, who began as growers, hatcherymen, feed dealers, feed manufacturers or broiler processors and over time assumed the risks of investment in feed, chicks and supplies and also assumed the risk of finding a market for the broilers.

25

Integrated broiler production has developed in areas of limited alternative agricultural enterprise, and has replaced or supplemented incomes derived by rural families from other sources.

26

Production planning by integrated broiler producers must be done almost entirely without knowledge of the market conditions which will prevail when their products are marketed other than historical generalities.

27

Production decisions for integrated broiler producers begin as much as 18 months before the product of those decisions reaches the market, with the decisions relative to placement of breeder chicks.

28

The final opportunity for adjustments in the broiler integrator's production comes at the point where broiler chicks are placed for the growout, a point approximately 8 weeks (between 7 and 9 weeks, depending on the type of chicks, the season and

weather conditions, the feed used, the weight bird desired by the producer's customers and other factors) prior to the date on which the broilers will be ready for slaughter and must be marketed.

29

The key production decisions for integrators producing and marketing broilers must therefore be made well in advance of the period within which the broilers must be marketed.

30

Fresh broilers are highly perishable.

31

More than 90% of all federally inspected RTC broilers are sold in non-frozen, chilled (ice- or CO_2- packed) form. According to the January 30, 1975 issue of "Poultry Slaughter", issued by the United States Department of Agriculture, Statistical Reporting Service, Crop Reporting Board (Table, p. 2), only 616,559,000, or 7.8% of the total 7,916,835,000 total pounds of broilers certified by USDA were marketed as frozen product.

32

In June 1966, the National Commission on Food Marketing published a staff study entitled "Organization and Competition in the Poultry and Egg Industries", Technical Study No. 2, National Commission on Food Marketing. The study was prepared by the Commission staff, with the formal and informal assistance of several divisions of the U. S. Department of Agriculture. I consider Technical Study No. 2 and its findings reliable and in general accord with my own observations as an economist and employee of the United States Department of Agriculture, Poultry Division about the production and marketing of broilers. Attached to and incorporated in this affidavit

are copies of pages 50, 52, and 53 of the National Food Commission Technical Study No. 2.

33

The Food Commission study reported the following findings with respect to bargaining relations between integrated producers of broilers and their customers, and in my opinion the statement of their findings accurately reflects the true facts at the time of the study and today:

> "An additional factor of considerable importance is the perishability of the products, particularly ice-packed chicken. Broilers are produced continuously, with little leeway in timing of slaughter. When supplies build up, retail buyers must be found. No important alternative outlet is available to divert surplus supplies.
>
> The retail organization has greater latitude in determining how many chickens to buy than the processor in determining how many to sell. Retail merchandising practices thus are highly important to suppliers. Retail specialing creates large product demands during special weeks but greatly reduced demands during non-special weeks.
>
> It should be noted that the largest retail chains typically have not specialed chickens in all divisions the same week. Hence, their overall store demand for chickens has been more stable from week to week than demand of smaller chains that have only one weekly sales plan for the entire operation. However, some suppliers have served some divisions of a chain but not others, because of location and other factors. Where this has been the case, fluctuating division requirements were translated into fluctuating demand facing regular division suppliers.
>
> For processors regularly dependent upon selling large volumes to certain customers, fluctuating retail requirements have caused suppliers to be burdened periodically

> with heavy inventories. When unsold supplies piled up, suppliers found themselves in rapidly deteriorating bargaining positions and were increasingly willing to sell at prices below current market levels."

34

Broilers are produced through a biological process, and once production is committed by the integrated producer, he must either sell his product or destroy it.

35

Broiler integrators, and not contract growers, absorb the primary impact of price fluctuations, both for feed and other input costs and for broiler prices in the market.

36

Integrated broiler producers often market their product at prices insufficient to return to them their cost of producing the broilers, and the broiler market during several recent years has been characterized by violent price swings within the year.

37

The demand for broilers is for birds in a fairly narrow weight range of from approximately 2 to approximately 3½ pounds dressed weight.

38

Broiler chickens which are not slaughtered when they reach desirable market weight remain in the field consuming feed, and thereby increasing the production cost incurred by the integrated producer. Birds surpassing desirable weight must normally be sold at a discount below prevailing price levels for desirable weight birds. Thus, the cost per pound increases while the realizable price per pound decreases if broiler chickens are not slaughtered when they reach the market weight desirable to the integrated producer's customers.

39

The market conditions under which RTC broilers are produced and marketed are typical of conditions in agricultural markets generally, and in some cases even more difficult for producers to cope with than conditions with respect to other commodities. Broilers are a perishable commodity, and must be marketed regardless of demand; the sellers are comparatively small, scattered and uninformed with respect to inventories and demand, and are consequently highly susceptible to overproduction; the demand is seasonal and cyclical, and there are ready substitutes—for example beef and pork—available; the market price fluctuates weekly; the market is dominated by concentrated buyers; and market signals cannot flow to producers in such manner as to allow them to balance production with demand.

/s/ RICHARD C. LARKIN

Sworn to and subscribed before me this 30th day of April, 1975.

THEODORA FERNIANY
Notary Public

Notary Public, Georgia, State at Large

My Commission Expires Feb. 20, 1978

TABLE 6-3.—*Sales of eggs by selected egg handlers to largest customers*[1]

Firm group	Percent of sellers' egg sales to—		
	Largest customer	2d through 5th customers	5 largest customers
	Simple average percent for group		
Firms by million dozen sold monthly:			
1-3 (12 firms)	23.1	31.8	54.9
Under 1 (19 firms)	33.4	33.3	70.7

[1] Firms were requested to report sales by customer to their 5 largest customers for a period of at least 2 months between Nov. 1, 1964 and Apr. 30, 1965. Data furnished were then converted to monthly averages and percentages computed for each firm. Percentages reported in this table are simple averages for each group.

Source: National Commission on Food Marketing survey, 1965.

firms. But for turkeys, smaller firms sold relatively more to these three chains.

Brokers were used by several reporting poultry and egg firms (table 6-5). Products sold through brokers by firms using them averaged between 6 and 44 percent. Average brokerage rates for chickens and turkeys ranged between .31 and .35 cents per pound and for eggs around one-half cent per dozen.

Bargaining Relations

Nationally, the largest 20 young chicken and turkey processors have accounted for a larger proportion of industry volume than has been purchased by the largest 20 retailers. But several conditions in addition to relative national concentration affect bargaining strength. Important among these conditions is the tendency for buyers and sellers to deal fairly regularly and consistently with each other. Location of buyers and sellers with respect to each other places practical limitations on the number of customers a seller can efficiently serve. Small volume sellers in particular tend to deal with relatively nearby customers.[4] Volume and product uniformity requirements of large buyers make it advantageous for them to deal with suppliers who can furnish their requirements on a consistent basis.

An additional factor of considerable importance is the perishability of the products, particularly ice-packed chickens. Broilers are produced continuously with little leeway in timing of slaughter. When supplies build up, retail buyers must be found. No important alternative outlet is available to which to divert surplus supplies.

---

[4] In a 1962 survey of 58 processing plants, plants slaughtering under 30,000 birds weekly marketed 69 percent of their volume within 50 miles of the plant and 31 percent between 50 and 100 miles. Larger plants marketed most of their birds over 100 miles away. Krueger, R. J., *op. cit.*

BEST COPY AVAILABLE

TABLE 6-5.—*Use of brokers and brokerage rates paid by type of product and firm, 1964*

Type of product	Type of firm	Firms using brokers		
		Number	Average percent handled by brokers [1]	Average brokerage rate, cents per pound (or dozen eggs) [1]
Chickens	Chicken processor only	17	21	0.34
	Chicken processor handling other poultry products	16	18	.31
Turkeys	Turkey processor only	5	6	0.35
	Turkey processor handling other poultry products	10	44	.31
Eggs	Egg handler or processor only	20	21	0.48
	Egg handler with other poultry products	5	11	.50

[1] Simple average for firms reporting use of brokers.

Source: National Commission on Food Marketing survey, 1965.

The retail organization has greater latitude in determining how many chickens to buy than the processor in determining how many to sell. Retail merchandising practices thus are highly important to suppliers. Retail specialing creates large product demands during special weeks but greatly reduced demands during nonspecial weeks.

It should be noted that the largest retail chains typically have not specialed chickens in all divisions the same week. Hence, their overall store demand for chickens has been more stable from week to week than demand of smaller chains that have only one weekly sales plan for the entire operation. However, some suppliers have served some divisions of a chain but not others, because of location and other factors. Where this has been the case, fluctuating division requirements were translated into fluctuating demands facing regular division suppliers.

For processors regularly dependent upon selling large volumes to certain customers, fluctuating retail requirements have caused suppliers to be burdened periodically with heavy inventories. When unsold supplies piled up, suppliers found themselves in rapidly deteriorating bargaining positions and were increasingly willing to sell at prices below current market levels. The fact that smaller suppliers have tended to sell larger proportions of their outputs to individual customers has increased the uncertainty of the demands they faced, compared with larger firms who could spread their sales over a greater number of customers.

Since most turkeys have been marketed frozen, they could be stored if current market conditions were judged unsatisfactory. However, they

eventually had to be sold mainly through retail outlets. Retailers must merchandise turkeys heavily during Thanksgiving and Christmas holidays to satisfy traditional consumer demands of these times, but they have been able to exercise a great deal of latitude over how frequently they specialed turkeys at other times of the year and how much retail counter space they gave to turkeys.

For eggs, supplier-customer relationships have tended to be more regular and consistent than for chickens and turkeys. Sellers have guarded especially against losing customers because new ones have been difficult to find.

Exchange practices have reflected the stronger bargaining positions of buyers. When concessions or allowances were made, they usually flowed in one direction—from seller to buyer, not from buyer to seller. Allowances have taken a variety of forms: Quantity discounts to large buyers, advertising allowances, and price reductions. In some instances, bribery, cash payments and gifts from sellers to buyers have been involved, instances of which have come to the attention of Government regulatory agencies. Egg handlers frequently have granted concessions to retailers for the privilege of becoming suppliers of new stores and to avoid losing accounts. Turkey processors indicated that some retailers would buy the processor's branded product only if they also packed turkeys under the retailer's label.

Evaluation of poultry buyer-seller relationships from the standpoint of effective competition is a difficult process in which a number of factors must be considered. Continuing organizational change and new trading arrangements will raise new questions concerning the competitive environment and the encouragement and maintenance of free and open competition on the basis of price, quality, and service.

Pricing Processes

Variations have existed in the mechanics by which prices for chickens, turkeys, and eggs were established. But for each commodity there has been a great deal of formula pricing. Poultry processing firms and egg handlers responding to a question on formula pricing reported as follows:

Type of product	Percent of transactions to most important customers with prices tied directly by formula to a specified market quotation in 1964-65 [1]
Chickens	42
Turkeys	28
Eggs	72

[1] Firms were requested to report pricing methods on sales to their 5 largest customers for a period of at least 2 months between Nov. 1, 1964, and Apr. 30, 1965.

Source: National Commission on Food Marketing Survey, 1965.

Firms in all size groups sold poultry and eggs on formula bases, although for chickens and turkeys the largest firms reported relatively fewer formula sales than other sellers. In some instances, averages of 2 or more days'

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF MAURICE B. LAYTON

(Filed May 1, 1975)

State of Mississippi
County of Simpson

I, Maurice B. Layton, after first being duly sworn, on oath depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 3, Box 281, Magee, Mississippi.

4

I am and have been since 1969 a contract broiler grower for McCarty Poultry Farms, Inc.

5

I own two 15,000 square foot broiler houses having a combined total growout flock capacity of 30.000 chickens per cycle.

6

I built my first house in 1966. At that time I was under contract to raise breeder pullets for the Magee Cooperative. Construction and equipment of my first house cost approximately $10,000. Construction of the house was financed through the Federal Land Bank Association. The Federal Land Bank loan was for an amount approximately 50% to 60% of the value of the house (without equipment), and allowed payment over a 15 or 20 year term. I bought the equipment for my first house outright, with no financing.

7

My broiler houses and equipment are fully insured.

8

In 1969, at the time I started growing with McCarty Poultry Farms, Inc., I built and equipped my second house at a total cost of approximately $12,500. I financed construction of my second house in the same way I financed my first house.

9

Between 1966 and 1968, I raised breeder pullets for the Magee Cooperative. During that time, I was also employed as a pullet and broiler serviceman by Magee Cooperative. In 1968, Magee Cooperative went out of the chicken business. Its assets and most of its growers were taken over by MFC Services (AAL), a federated cooperative.

10

In 1969, when I began growing broilers for McCarty Poultry Farms Inc., my contract with McCarty paid an amount per pound based on the Mississippi FOB Dock Equivalent wholesale price and on my feed conversion efficiency. Regardless of the market price or feed conversion efficiency, the contract guaranteed payment of 5 cents per bird placed.

11

My present contract bases payment on a base rate plus or minus a bonus or deduction from the base payment calculated on the basis of my feed conversion efficiency. Regardless of efficiency, however, the present contract guarantees payment of 6½ cents per bird placed.

12

My actual payments since I began growing broilers for McCarty have averaged between 8½ and 9 cents per bird.

13

I have not lost a flock or any substantial part of a flock since I have been growing broilers for McCarty. I don't know of any way you could lose a flock, except by having a tornado destroy the house, or to have the Government condemn the flock as in the Dieldrin situation.

14

In March of 1974, I had a flock of broilers in my houses which I had been growing for 3 or 4 weeks. At that time, I was notified by McCarty that the birds were going to be condemned by the Government because of Dieldrin contamination. After I was notified of the possible contamination, I was instructed by McCarty to feed the birds on a limited survival ration for 4 or 5 days. After that, the entire flock was destroyed.

15

Four or five weeks after destruction of the contaminated flock, at the end of what would have been the normal growout period for the batch which was destroyed, I received a check from McCarty Poultry Farms, Inc. in an amount equal to 6½ cents per bird placed with me at the beginning of the growout, even though all of the birds were destroyed in the middle of the growout period.

16

Since none of these birds had been sold, and also since I had only grown them for half of the normal growout period, I did not expect to receive any payment for the birds. I was only hoping that McCarty Poultry Farms, Inc. would be able to stay in business after the loss.

17

I have always gotten chickens from McCarty on a regular placement cycle. The period between the removal of one flock and the placement of the next flock can vary from two weeks to as much as five weeks; however, I always average about 4½ flocks each year. Even after the Dieldrin loss, I got a replacement flock on the next cycle in my normal place in the sequence.

18

There is no great risk in broiler growing for me—I am guaranteed enough to get my cost and labor out of it.

19

Broiler growing is a low risk operation, because the integrator takes most of the risk. I have been farming all my life, and this is the least risk I have ever known of. Both the marketing risk and the risk of feed price fluctuations is taken by the integrator.

20

My only real risk is that McCarty Poultry Farms, Inc. could go out of business and I couldn't grow chickens on another program. I feel like as long as McCarty is in business, I will make money.

21

There are a number of competing broiler programs in or near this area, including MFC, Sanderson, Morton Broilers, Fred

Moore, Southeastern Hatcheries, Wayne Poultry Company and Marshall Durbin Company.

22

If it were not for my broiler growing operation, I would have to seek employment off the farm. Growing chickens on contract, I know where some money is coming from. It would be hard to stay here without chickens.

23

The small fellow like me could not produce chickens profitably on his own.

24

My farm consists of 320 acres in all. Less than 5 acres of that is tied up in the broiler growing operation. I raise cattle on 240 acres, and the remainder is in timber.

25

I have about 300 head of cattle. I buy the calves myself, and also buy protein supplements, fertilizer, medication and vaccines.

26

I sell some of my cattle as feeder calves, and I graze some of them through winter and sell them in the spring.

27

I take all the risk in producing cattle, and I have lost money on my cattle production over the last two years.

28

I have never lost any money on a flock of broilers under contract with McCarty. There is no way we can lose any money unless the integrator goes broke.

29

The minimum payment guaranteed by McCarty would cover my costs, and that income would at least let us stay here. I have always made two or three cents per bird more than the minimum, however, and the only time I have been paid the 6½ cent per bird minimum was during the Dieldrin situation when the entire flock was destroyed.

30

In 1973, I settled five flocks with McCarty, for a total gross of approximately $14,500. In 1974, I settled four flocks, for a total gross of approximately $10,500. The 1974 gross included payment for the destroyed flock at the 6½ cent per bird minimum.

31

I estimate my annual operating costs in connection with broiler raising under contract as follows:

Item	Annual Cost
Fuel (Butane)	$1,200.00
Electricity	120.00
Insurance	342.00
House and equipment upkeep and maintenance	1,000.00

McCarty Poultry Farms, Inc. furnishes all litter used in my operation.

All expense for water is included in the electricity expense.

There is no ad valorem tax on any of the buildings or equipment used in the broiler operation. I pay $185.00 annually in taxes on the entire farm of 320 acres, of which only 5 acres is devoted to the broiler operation. Therefore, no significant tax expense is attributable to my broiler growing operation.

32

I depreciate my houses for tax purposes over a 20-year period and my equipment over a 10-year period, both on the straight line method. My total depreciation expense for broiler houses and equipment is approximately $800.00 annually.

/s/ MAURICE B. LAYTON

Sworn to and subscribed before me this 8th day of April, 1975.

DORIS TUELOS
Notary Public

My Commission Expires May 16th, 1978

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF ALBERT B. MADDOX

(Filed May 1, 1975)

State of Mississippi
County of Simpson

I, Albert B. Maddox, after first being duly sworn, on oath depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 1, Box 38, Magee, Mississippi 39111.

4

I am and have been since 1966 a contract broiler grower for McCarty Poultry Farms, Inc.

5

My wife and I own two 15,000 square foot broiler houses having a combined total growout flock capacity of 30,000 chickens per cycle.

6

We built our first house in 1966, and our second house in 1967. The cost of construction and equipment for the first house was approximately $10,000, and for the second house, approximately $12,000. Construction of the houses was financed through the Federal Land Bank and the equipment in my first house was financed by State Guaranty Bank in Magee.

7

Our broiler houses and equipment are fully insured.

8

When we began in 1966, the contract with McCarty had payments based on the Mississippi FOB Dock Equivalent wholesale

price and on feed conversion efficiency. Regardless of the market price or feed conversion efficiency, the contract guaranteed payment of 5 cents per bird placed.

9

Our present contract bases payment on a base rate plus or minus a bonus or deduction from the base payment calculated on the basis of my feed conversion efficiency. Regardless of efficiency, however, the present contract guarantees payment of 6½ cents per bird placed.

10

Since 1966, my actual payments from McCarty have averaged between 8 and 11 cents per bird. I received payments averaging about 11 cents per bird in 1973, and about 9½ cents per bird in 1974. The 1974 earnings included a payment at the minimum rate of 6½ cents per bird for a flock placed with us which had to be destroyed in the middle of the growout period because of Dieldrin contamination.

11

We had two-week old chickens in our houses at the time we were notified of the Dieldrin contamination. We fed them until they were five weeks old while the situtation was being investigated, and then they were all destroyed.

12

A few weeks later, at the time the birds would have been picked up at the end of the cycle, we received a check from McCarty Poultry Farms, Inc. in an amount equaling 6½ cents for each bird placed in our houses during the cycle, even though they were destroyed and never sold.

13

We wouldn't have built our broiler houses without knowing that a contract program like McCarty's was available.

14

My farm consists of 125 acres total. Three acres, or maybe four, are used in the broiler operation.

15

I also have hogs and cattle, which I breed and market. The hogs run on about 15 acres, and cattle are on all the rest of the acreage. There is some doubling up, of course.

16

I just about broke even on the cattle last year, and the hogs don't even pay for themselves. The chickens have been feeding the hogs since we've been involved in contract broiler growing.

17

With feed costs going up like they were, the market price came down on cattle. Prices didn't come down on hogs, but there was so much cost in feeding them that you couldn't make any money. We didn't worry about the chickens, of course, because they were on contract.

18

We bear all the risks in the cattle and hog raising.

19

There is no risk at all for us in growing chickens under contract—just the work. If everything else was making us money like the chickens, we would be in good shape. We get a regular income from growing chickens on contract.

20

The 6½ cents minimum payment would cover all of our costs in the chicken operation. When we built our houses, we set up our budget based on the minimum payment, which at that time was 5 cents a bird.

21

Our farming operation couldn't make it without the contract chicken growing. We would have to get off-farm jobs.

22

We get regular placement of chickens from McCarty on a rotating basis. Except for the Dieldrin situation, we had never been out of chickens for more than a month. Even after the Dieldrin loss, we had chickens the next cycle at the regular time, which was about a month from the time the destroyed chickens would have been grown out.

23

In 1973 we settled four flocks with McCarty Poultry Farms, Inc. for a total gross of $13,919.17. In 1974, we settled five flocks, for a total gross of $13,225.08. The 1974 gross included payments for the flock destroyed because of Dieldrin contamination, at the 6½ cent per bird minimum payment.

24

I estimate the annual operating cost in connection with our contract broiler raising operation as follows:

Item	Annual Cost
Fuel (butane gas)	$830.00
Electricity	300.00
Insurance	400.00
Taxes	(None)
House and equipment upkeep and maintenance	500.00
Clean-out of house (hired labor and equipment)	450.00

McCarty Poultry Farms, Inc. furnishes all litter used in our operation.

All expense for water is included in the electricity expense.

25

We are depreciating our broiler houses for tax and bookkeeping purposes over a 10-year period, and the equipment is depreciated over an 8-year period, both on the straight line method. Thus our total depreciation expense for buildings and equipment is now $2,430.04 annually. We will have our buildings and original equipment depreciated down to zero in two or three years.

26

We have never lost money on a flock of chickens grown under contract. I don't know of any way we could lose money, and our only risk is if McCarty goes under and there is no other program.

/s/ ALBERT B. MADDOX

Sworn to and subscribed before me this 8th day of April, 1975.

DORIS TUELOS
Notary Public

My Commission Expires May 16th, 1978.

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF JAMES ARCHIE MARTIN

(Filed May 1, 1975)

State of Georgia
County of Forsyth

I, James Archie Martin, after first being duly sworn, on oath, depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 1, Cumming, Georgia 30130.

4

I am presently, and have been for two years, a contract broiler grower for A. C. Smith Poultry Company.

5

I started in the chicken business in 1955, when I became a contract broiler grower for Roy Heard. I raised approximately 2,500 birds at a time back then.

6

Roy Heard guarantees me 2 cents per pound, live weight. Without a grower contract, and particularly without the guaranteed payment, I would not have gone into the chicken business. I didn't have the capital or financing necessary to get into the business on my own and, even if I did, I do not think I would have been willing to risk it on chickens.

7

From 1955 until 1960, I rented my chicken houses, and did not own any.

8

In 1960, I built my first chicken house. Roy Heard financed the entire cost of building it, and he was the one who suggested that I build it. If Roy Heard had not suggested that I build one and had not provided the financing for it, I probably would never have built any chicken houses.

9

I built my second house in approximately 1964. I built my third house about three years after I built my second house. I financed the construction and equipping of these two houses through the Federal Land Bank.

10

I paid out each of the loans on my houses in an average of three years.

11

My three houses have a combined capacity of 24,000 birds.

12

I was a contract broiler grower for Roy Heard from 1955 until 1968, when Roy Heard went out of business.

13

When Heard went out of busines, I switched and became a grower with Eldo Grogan.

14

I grew broilers for Eldo Grogan until he went out of business in 1973.

15

When Grogan went out of business, I switched to A. C. Smith Poultry Company. I have been a grower for A. C. Smith Poultry Company since that time.

16

If it were not for integrated producers like Roy Heard, Eldo Grogan and A. C. Smith, I never could have gotten into the broiler business. I would not have gotten into the broiler business, and without them I would not remain in it.

17

If the growout contract was revised to eliminate the guaranteed payment provision I would no longer raise chickens. I need to know in advance what I am going to get at the end of the growout, otherwise I simply couldn't do it.

18

A. C. Smith, like Roy Heard and Eldo Grogan, guarantees me 2 cents per pound. I also can receive feed conversion bonuses if the market price is right and if my feed conversion is good, as it usually is. On the first two flocks I ever grew for A. C. Smith, I received the maximum feed conversion bonuses possible.

19

A. C. Smith also provides me with a fuel allowance of $12.00 per 1,000 birds placed with me and sold between December 15 and May 15. The fuel allowance just about pays my fuel costs for those months.

20

The guaranteed payment of 2 cents a pound covers my costs and pays me for my labor.

21

During the first two weeks of the growout, I put in about three to four hours per day in caring for the chicks. After that, the growout only requires about two hours per day labor. My wife helps me at times, so my personal labor input is even less than the total figures I have just stated.

22

I risk my chicken houses and my labor in growing-out chickens. My houses are insured, so that risk is not big. The labor required during the growout is not great, so I do not consider that risk to be a big one either.

23

A. C. Smith risks his investment in the chickens and all his other equipment. I bet that he has as much invested in a single bunch of chickens as I have in my houses. If the chickens die, A. C. Smith loses, not me. If the market price for chickens drops, A. C Smith loses again; I have my guaranteed payment. If feed costs go up, A. C. Smith loses, not me.

24

Even though two of the producers I grew for went out of business, I have never had any trouble at all getting chickens on contract. I have never had trouble getting chickens from

A. C. Smith. I have always received chickens on a regular basis. With A. C. Smith, I am out of chickens for about two weeks between each flock. I have never been skipped by any of the people I have grown for.

25

I have absolutely no worries about getting chickens, as long as A. C. Smith and other integrated producers stay in business. I could probably switch producers if I wanted to, but I don't want to.

26

I also raise cows; I have approximately 20 head. I have been losing money on the cows for the three years that I have been raising them.

27

I have a 20 acre farm, of which about ¾ of an acre is devoted to growing-out broilers. Most of the farm is devoted to pasture for my cows.

28

Broiler-growing complements cattle raising, since the litter from the broiler growout can be used as fertilizer on my pastures. I have some people who clean out my broiler houses for nothing, just to get the litter. I have them spread a few loads on my pastures, for which they charge me $14.50 per truck load, which is less than they would charge me if it were not my litter in the first place. Regular commercial fertilizer would be much more expensive—it now costs almost $200.00 per ton and pastures usually require about a ton per acre.

29

My contract broiler growing provides me with an income supplement. I work full-time as a hatchery foreman for Roy Heard, who is now an egg producer.

30

My wife worked with ITE in Tucker, Georgia until Christmas, when business got bad and she was laid off.

31

From our full-time employment, my wife and I earned $13,728.00 last year. I only settled four flocks last year with A. C. Smith, but I received contract payments totalling $6,617.00 for them. I settle an average of 4.5 flocks each year.

32

My 1974 expenses in connection with my broiler growing operation were as follows:

Item	Annual Cost
Fuel	$1,739.00
Electricity	240.00
Insurance	254.00
House and equipment upkeep and maintenance	680.00
Interest	120.00
Shavings	270.00
Gravel	160.00
Book work	10.00
Taxes	308.00

All water expenses are included in the electricity expense. The tax figure represents all property and ad valorem taxes on my entire 20 acre farm.

The shavings expense is recovered by my saving on labor during the cleanout of my houses, since people will clean them out at no cost to me just to get the litter. The shavings cost is also recovered because those people will sell me a portion of the litter they clean out at a price less than they charge other people because it came from my houses.

33

For tax and bookkeeping purposes, I depreciate my chicken houses on the straight line method over a period of either 10 or 15 years. I depreciate most of the equipment used in the houses over a 10 year period, again using the straight line method. Some equipment items are depreciated over periods of 2, 4 or 5 years using the straight line method. For 1974, my total depreciation expense related to my broiler growing activities was $1,801.00.

/s/ JAMES ARCHIE MARTIN

Sworn to and subscribed before me this 25 day of April, 1975.

MARY CASTLEBERRY
Notary Public

Notary Public, County of Forsyth
State of Georgia

My Commission expires 8-10-76

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF LeROY EMERSON MAYFIELD

(Filed May 1, 1975)

State of Georgia
County of Forsyth

I, LeRoy Emerson Mayfield, after first being duly sworn, on oath depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 7, Cumming, Georgia, 30130.

4

I am presently, and have been for almost four years, a contract broiler grower for A. C. Smith Poultry Company.

5

I first started raising chickens approximately 35 years ago. For the first 10 years, I raised them on my own, not as a contract grower. I would buy 300 broiler chicks at a time, and I would also purchase all the feed and medications the chickens required. I would sell them to a fellow from Gainesville, Georgia who would pay me several cents per pound less than the prevailing wholesale market price for chickens in the Gainesville area.

6

I made a little money during the 10 years I raised chickens on my own, but there were many times when I lost badly. I lost money during the last two years that I grew on my own. Lots of other people I knew lost money in the broiler business at about the same time. Many people who were growing chickens on their own actually lost their farms because they simply couldn't pay their bills; their chicken raising was not generating any income for them.

7

After growing chickens on my own for 10 years and after losing money for two consecutive years, I stopped raising my own chickens and became a contract broiler grower for the Heards.

8

I became a contract grower for two reasons. First, as a contract grower, I received a guaranteed payment per pound, so I knew in advance what my minimum return would be. This guaranteed payment was very attractive compared to the times I raised on my own, never knowing whether I would make a nickel until I sold my chickens to the man in Gainesville. The second reason I became a contract grower was that I could growout more chickens that I could purchase and feed on my own, since the Heards, not me, had to pay for the larger number of chickens placed with me under contract and they also had to absorb all costs of feed and medicine for the birds.

9

Shortly after becoming a contract grower, I stopped contract growing because I had to serve in the Army. I got out of the Army in 1953 and continued to raise for the Heards for another 5 or 6 years, until approximately 1959.

10

In approximately 1959, I had an opportunity to go to work for a construction contractor and I quit growing broilers for the Heards. I stayed out of the chicken business for approximately two years.

11

In 1961, eggs were bringing a very good price. So, I quit working for the contractor and decided to try my hand at the hen and egg business, once again going out on my own with my own hens and my own feed bills.

12

I went into the egg business rather than returning to the broiler business because I could bring eggs to the market and be paid once every week, unlike the broiler business where, either as a grower or on my own, I would get paid with every flock rather than every week.

13

I raised hens and sold eggs from approximately 1961 to 1969.

14

I made some money during the eight years I was in the egg business. I lost money continually, however, during the last year of my egg business. The market for eggs had declined while feed costs had gone up. I had to sell 15 acres of my farm in order to get enough money to pay my feed bills. To put it simply, I lost my shirt that last year.

15

From 1969 to 1971, I was out of the poultry business entirely, working for other people.

16

In July, 1971, I became a contract grower for A. C. Smith Poultry Company. I have been growing for A. C. Smith under contract ever since.

17

I regularly get chickens to growout. I settle 4 or 5 flocks per year. The average time between flocks is approximately 10 to 14 days. If the time between flocks does run longer than 14 days, it is usually because I have asked A. C. Smith to hold off putting birds into my houses, either because I was sick or had to be out of town.

18

The 10 to 14 day period between flocks represents, with a little leeway, the approximate amount of time it takes for me to get my houses ready for a new flock after the grown-out flock has been removed by A. C. Smith's people. I am not saying that it takes 10 to 14 days of full-time work to ready the houses, but it does take that long given the amount of time I have available for the task.

19

When I raised broiler chickens on my own, I would only be able to sell about 3 or 4 flocks per year; it would take 12 weeks to raise them back then. Now it only takes 7 to 8 weeks and I settle more flocks per year with A. C. Smith.

20

When I was growing chickens on my own, I often ended up selling about half of the broilers I started out with. This isn't the case anymore, so I can pretty well figure what my growout payment will gross me, since I don't lose many birds during the growout.

21

I have two chicken houses, with a combined capacity of 15,000 broilers.

22

Half of one of my chicken houses was built in approximately 1951. I added on to it in 1967. I built the second chicken house in 1972, but only after A. C. Smith assured me that he would place his chickens in the new house.

23

Each time I built or added to the chicken houses, I borrowed the money I needed to build them from the Production Credit

Administration. I paid out the loan for the 1967 addition in approximately 1971. I paid out the loan for the house I built in 1972 toward the end of 1973.

24

My farm used to have 40 acres, until I had to sell 15 to cover my losses from my egg business. Out of the 24.8 acres I now have, I would say no more than one-half acre is devoted to broiler growing. Both houses are located in a pasture, and my cattle graze right up to the edge of the houses.

25

As long as I do a good job for A. C. Smith, I know that I will get chickens to grow out. I have no fears about not getting broilers to grow out. I could also switch from A. C. Smith if I wanted to. For example, I was approached by a person representing J&M about 6 weeks ago, who wanted to know if I would like to grow broilers for them.

26

A. C. Smith guarantees me a payment of 2 cents per pound, liveweight. I also receive feed conversion bonuses, if the market price is above a certain level and if my feed conversion ratios meet certain standards.

27

A. C. Smith also pays me a fuel allowance. On the last two flocks we settled, I received a total of $360.00 in fuel allowances.

28

I have never lost money as a contract grower. Contract broiler growing helps me to stay on my farm; if it weren't for the contract payments, I couldn't remain here. I could make more money somewhere else, but I really like staying on the farm.

29

I do not think that I would grow chickens at all if the contracts did not guarantee me a minimum payment. I would probably quit growing without the guaranteed payment. What with the price of chickens these days, I am sure the producer is not making anything, so I am happy to get my guaranteed payment.

30

If I didn't have the guaranteed payment, I'd be getting the light bill, the phone bill and all the other bills we all get without knowing whether or not I would be making a nickel on the broilers. I just couldn't take those risks.

31

The only risks I do take involve my chicken houses and my labor. My chicken houses are partially insured, so that risk is not great. So, all I really risk is my labor.

32

If the chickens in my houses die, A. C. Smith loses all the money he has tied up in those chickens. All I would lose would be the labor I had put into caring for that particular flock.

33

The labor required to grow out chickens only approaches a full-time proposition during the first two weeks of each new flock. During those first two weeks, the chicks require a lot of attention. During the last five weeks of the growout, only about three hours per day of labor is required. My wife and my children help me to take care of them, checking the feeders and adjusting the ventilation, and things like that.

34

A. C. Smith makes the big investment here. The labor I risk in each flock is not that great and my chicken houses are partially insured. I paid out all my loans on my chicken houses in less than 4 years each time, but I expect that the houses will last at least 15 years. If anyone is looking at the investment made in producing broilers, he should look at A. C. Smith, not me.

35

In addition to my poultry activities, I have been a cattle trader almost all of my life. Growing-out broilers fits in very well with my cattle trading, since growing-out broilers leaves me enough time to travel around trading cattle during the day.

36

In addition to any cattle I may have available for trading at any particular time, I also have what I call "keeping" cattle, which I raise for market and for my own use.

37

Unlike the broilers, I own both my keeping cattle and my trading cattle and I have to purchase the necessary feed and other supplies for them. The cattle business was very bad last year. I only grossed $1,000.00 from my trading activities and $1,425.00 from sales of my keeping cattle. This latter figure does not include the value of any cattle I slaughtered for my family's eating. I made a lot more in the cattle business in 1973.

38

My broiler growing really benefits my cattle activities in an important way. While A. C. Smith Poultry Company generally recommends an annual cleanout of the litter in the chicken houses, I clean some out after every flock, and clean the houses to the ground once a year. I use this broiler litter on my pastures instead of fertilizer. Last year, I paid $345.00 for shavings and $461.00 for hired labor and equipment to clean out the houses. I recovered these costs and more by using the litter on my pastures, since I figure an equivalent fertilizer would cost about

$190.00 per ton or approximately $3,800.00 for a farm the size of mine.

39

In 1974, I settled 5 flocks with A. C. Smith and I received gross payments totalling $6,925.84.

40

My 1974 expenses in connection with my broiler growing operation were as follows:

Item	Annual Cost
Fuel	$703.91
Electricity	300.00
Insurance	112.00
House and equipment upkeep and maintenance	313.62
Hired labor	461.00
Shavings (litter)	345.00
Taxes	170.53

All water expenses are included in the electricity expense. The tax figure represents property and ad valorem taxes on my entire farm, not just the one-half acre devoted to broiler grow-out.

The shavings and hired labor expenses are totally offset by the value of the litter as fertilizer for my pastures.

The fuel figure is probably high, since I entered 1975 with a large amount of fuel in my storage tanks. The fuel figure will vary from year to year, depending upon when I last fill my tank in each year.

41

For tax and bookkeeping purposes, I depreciate my broiler houses over 15 years using the straight line method. I am depreciating various pieces of equipment in each of the houses over periods of 8, 6 and 4 years using the straight line method. I am depreciating a new feeder motor over a 5 year period using the double declining balance method. My total depreciation expense for assets connected with my broiler growout activities was $1,129.56 in 1974.

/s/ LEROY EMERSON MAYFIELD

Sworn to and subscribed before me this 25 day of April, 1975.

MARY CASTLEBERRY
Notary Public

County of Forsyth
State of Georgia

My commission expires August 10, 1976.

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF H. F. McCARTY, JR.

(Filed May 1, 1975)

State of Mississippi
County of Simpson

I, H. F. McCarty, Jr., after first being duly sworn, on oath depose and say as follows:

1

I make this affidavit for use by National Broiler Marketing Association in support of its motion for summary judgment filed in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

I am President of McCarty Poultry Farms, and McCarty Hatcheries, Inc., located in Magee, Mississippi. My family also owns a substantial interest in State Poultry Company which processes and markets the live bird production of McCarty Poultry Farms, Inc. under a profit and loss sharing contractual arrangement with McCarty Poultry Farms, Inc. Our operation (known and hereinafter referred to as McCarty Enterprises) is an integrated producer of broilers. McCarty Poultry Farms, Inc. is a member of National Broiler Marketing Association.

4

In the fall of 1949 I bought a chick hatchery from my father's estate; at that time the hatchery sold about 3,500 chicks twice a week.

5

I began to find that most of my chick customers were beginning to get chicks from other sources to raise on contract without having to buy them, so I started putting birds out in self-defense. I charged the grower for feed, chicks, and medication, and sold the birds for them. Under this arrangement the grower was standing the market risk. This situation lasted no more than three or four years.

6

The contract grower system, as we know it now, began to develop in the early fifties in our region because in some cases the man with the baby chicks couldn't get a grower to put the birds out because the grower could not, or would not. take the market risk.

7

The contract system works because the integrator is in the market over a 12-month period and can average out the highs and lows in the market, which fluctuates considerably. The grower cannot raise more than four or five flocks a year and thus cannot average the highs and lows. I remember in particular a grower who lost money on five flocks in a row and could not pay for his feed and chicks. You don't sue a man who can't pay.

8

In the first three or four years I was buying hatching eggs from North Carolina, since we thought you couldn't produce them in Mississippi because of the temperature. We were also buying our feed from someone else at that time, but then we moved from a complete feed to a concentrated program and began buying corn from the midwest. We built a feed mill, and began producing our own feed.

9

In the early days we were selling live birds to individual processors in New Orleans and Jackson. We were depending on the Market News Service of USDA, which reported a Georgia live price, for our market information.

10

The initiative to move into broiler production worked on my operation from two directions. In 1948 and 1949 growers came

to me asking me to place chickens with them. At the same time feed companies were also trying to interest us in growing chickens, in order, of course, to sell their feed.

11

We purchase baby chicks for our breeder flocks from primary breeders. We purchase and own the breeder flocks and all of the necessary feed and medication for the breeders. All of the pullets and cockerels are grown on company-owned growing farms. Thirty-five to forty percent of our breeder hens are kept on farms which we own. The remainder are placed with growers under contract.

12

We hatch the eggs produced from the breeder flocks in our hatchery and place the broiler chicks with our growers under contract. We have approximately 130 growers.

13

The grower wanted to raise chickens because it gave him an income and an ability to stay on the farm. In our area cotton and watermelons had long been grown on small farms, but they were no longer profitable. Broilers were good in poor farm areas, such as ours, but not in rich farm areas. For example, they floundered in the delta region of Mississippi. At the same time ordinary farmers did not have the capital to take the market risk of production, to invest in feed and chicks, and to coordinate their production and marketing.

14

As a consequence, we have integrated our operation so that now, and since the 1950's, we have produced broilers through an integrated operation which involves the placement, raising and breeding of breeder flocks to produce eggs to be hatched as broiler chicks; the hatching of broiler eggs and placement

of broiler chicks; the raising of broiler chicks for a period of seven to nine weeks; the catching, cooping and hauling the grow-out broiler chicks to processing facilities; and the operation of facilities to process and prepare ready-to-cook (RTC) broilers for market.

15

Since the 1950's, our growers have been under contract. The contract did have a market price feature, but this feature was discontinued in 1972 or 1973 when the cost of feed and the price of chickens both went through the ceiling. The market feature was not related to the spread between feed costs and market price and so therefore it became unfair. Since that time our contract has been changed so that the grower's base payment is based on the standard of feed conversion. We average the feed conversion obtained by growers over a three week period—the week before, the week of, and the week after the flock is taken to the processing plant. A grower who comes within five points plus or minus the average gets the base payment. We do, of course, guarantee a minimum payment of 6½ cents a bird regardless of feed conversion or the price we get for the broilers.

16

In early 1973 with the increased price of butane we made an upward adjustment of approximately 5% in the contract. Again in the fall of 1973 we increased the base grower payment from 2¼ cents to 2¾ cents per pound, and made that increase retroactive to February, 1973. This involved retroactive payments to our growers in the total amount of $187,172.02.

17

For years we have guaranteed a grower at least five cents a bird placed and for the last two or three years our guaranty has been 6½ cents a bird, whatever the grower's feed conversion rates might be. We pay the grower for the chickens on

the basis of the number of birds placed, even if his house and the whole flock burns up. We encourage our growers to insure their chicken houses against fire and 65 to 70% of our growers in fact do carry insurance against fire and other hazards. We have never had a situation where we have lost an entire flock placed with a grower because of disease.

18

Our growers have never lost money. Our contract is more than a "no-loss" contract. It is a guarantee of a profit for the average grower.

19

We have a philosophy that no grower should be cut off. If we take anybody on as a grower we have an obligation to him. If he is not performing, it's our fault. We have had to terminate only four growers at our initiative in the last five years, and that was for continuing failure to perform according to our program.

20

In March of 1973, we were required to destroy about 2,250,000 of our broilers, which we had placed with growers, because they were discovered by the United States Department of Agriculture to contain Dieldrin in small amounts exceeding the maximum allowable tolerance. Dieldrin is a pesticide which is sometimes used on corn and soybeans and other feed ingredients.

21

The Dieldrin situation came about in this way. For a considerable period of time, USDA and the Food and Drug Administration had been monitoring poultry processing plants in Mississippi on a periodic basis.

22

Early in January, 1974, USDA ran across a situation in a processing plant in northern Mississippi where hens were found to have more than the allowable tolerance of Dieldrin. Following this discovery USDA began an intense check and in February discovered traces of Dieldrin in some broilers. USDA then zeroed in on all plants in Mississippi, and in March found traces of Dieldrin in five plants. On March 18th they found it in ours. USDA seized the product and it couldn't be sold. The only alternative was to destroy processed and live birds—all of which had to be buried. The source of the Dieldrin was traced to some vegetable fat we had used in our feed. This vegetable fat was concentrated soybean oil. Apparently the Dieldrin residue gets more concentrated as the oil gets refined.

23

We were out of production from March 18 until May 1. As I stated above, we were required to destroy almost 2¼ million broilers we had placed with growers. Some of these birds had only grown for three weeks. We paid all the growers 6½ cents for each bird placed. We would have paid the growers an average of 2¾ cents a pound per bird had the birds grown to full size. To the extent of the difference the growers lost an expected profit because of the Dieldrin contamination. If we collect on our products liability suit against our supplier, however, we will in fact pay to the growers the 2¾ cents a pound they otherwise would have received but for the Dieldrin contamination. On the other hand, in contrast to the growers, our entire operation lost a grand total of $1,609,285 as a result of the Dieldrin contamination. Except for some anticipated profit, our growers lost nothing.

24

We work very closely with our growers, and of course we supervise them in the raising of the broilers. We also assist and advise them with respect to the construction and purchase of

broiler houses and equipment. For instance, in 1973 we began working with power ventilation which involves insulating the roof of the broiler house and adding fans and thermostats. While this costs some 10 or 11 cents a square foot, it allows the grower to increase the capacity of the house by approximately one-third and thus recover his additional investment in less than two years. We have converted quite a few of our broiler houses to power ventilation.

25

Typically our growers involve a husband and wife situation. Frequently, in addition to growing broilers our growers also graze cattle on the balance of their land. They use the litter (we supply the shavings at no cost to the grower) from the broiler houses as fertilizer for their pastures.

26

We also have numerous situations where investors build broiler houses, equip them and use hired labor to raise the broilers.

27

It is my impression that the net income of our growers is higher than the income earned by those doing comparable work in factories in our area. A man with a job at a nearby factory making $2.50 to $3.00 an hour in my estimation does not generally have a home or automobile comparable to that of our broiler growers, who also have the advantage of being able to live on a farm. A grower is not required to be a businessman, nor are there educational requirements. We furnish all of the supervision, and take all of the market risks. Primarily, to be successful, a grower has to be willing to follow our instructions.

28

The McCarty Enterprises complex makes all of the decisions with respect to both production and marketing of the broilers we produce.

29

Under our grower contract the grower provides the housing for the birds and equipment for feed and watering, plus electricity, water and heating fuel.

30

We own and bear the risk of loss of all feed, medicines, vaccines and most other supplies essential to the production of a marketable broiler.

31

As evidenced by the Dieldrin situation our integrated operation, and not the contract grower, owns the broiler "crop" or flock and bears the risk of its loss from disease, natural disaster, feed contamination or any other cause. We own and bear the risk of loss of the broiler chickens at all times during production including the growout phase.

32

We have a substantial investment in land, buildings and equipment devoted to the production of broilers from the breeder flock stage through the processing and marketing stage.

33

In our operation we face both production and market risks, and we risk an investment in our breeder flock, our hatchery, our feed mill, feed and feed ingredients, various supplies, transportation and processing facilities and all labor necessary to prepare the RTC broiler for market.

34

The only phase of broiler production which requires any investment by the contract broiler grower is the broiler "grow out" phase. The contract grower's risk of investment in broiler production is limited to the value of his investment in the fa-

cilities (land, buildings and equipment) and services used in the growout phase. As stated above, the grower's risk of loss of his buildings and equipment is insurable and 60 to 70% of our growers do in fact have such insurance.

35

The only farm land owned by individual growers which is devoted to the raising of broilers is the land underlying the grower's broiler houses and the area required for a roadway to the houses. Our average grower has a housing capacity of approximately 33,000 birds, which requires no more than 4 or 5 acres.

36

Between 85 and 90% of our live bird cost of producing broilers is accounted for by inputs which we supply, including feed, chicks, medications, veterinary supplies and services, grow-out supervision, and labor for catching, cooping and hauling.

37

More than half of the live bird cost of producing broilers is accounted for by the cost of feed. McCarty Enterprises purchases feed ingredients on the open market and bears the risk of fluctuation in the cost of feed due to market conditions.

38

McCarty Enterprises sells broilers on the open market, has no guarantee of any return at all for its broilers and therefore we risk all of our investment in the production and marketing of broilers. Our growers, on the other hand, are guaranteed payment regardless of costs or prices.

39

We operate at full production only 18 to 20 weeks out of the year. During that time of the year, our growers do not have

more than 10 to 12 days between bunches. Around Thanksgiving and Christmas, when consumption of broilers is down, our production will decrease and during that time the longest period between bunches of chickens may be five weeks. When we decrease production in this manner, we spread our chick placements equally across the board and each grower receives his next flock in sequence. All growers will average 4½ flocks annually.

40

Integrated broiler production in our area of Mississippi has enabled growers to remain on farms by assuring them a steady income. Our growers have found that with broilers they could stay on the farm where otherwise they could not do so.

41

The most significant production decisions relative to the number of birds to be ready for slaughter during a given week are those which determine the number of breeder chicks to be placed and raised as breeder hens and cockerels. The number of breeders placed at a given time generally determines the number of broilers available for slaughter 12 to 18 months later. McCarty Enterprises makes the decision determining the number of breeder chicks to be placed.

42

After breeders are placed, the next significant production decision relative to the number of birds to be ready for slaughter during a given week is the decision which determines the number of broiler eggs which will be hatched and readied for placement as day-old chicks. The number of eggs set in our hatchery determines the number of day-old chicks available for placement 3 weeks later, and therefore determines the number of broilers which will be available for slaughter 10 or 12 weeks after the eggs are set. Again McCarty Enterprises makes

the decision determining the number of broiler eggs to be hatched.

43

The final opportunity to offset the number of birds ready for slaughter during a given week comes at the time broiler chicks are placed. Chick placements determine the number of birds which will be ready for slaughter 7 to 9 weeks after placement.

44

Any decision to adjust production downward after breeder chicks are placed must be made at the cost of the investment at the time of decision in the breeder hen, broiler egg and/or broiler chick, which is investment which is largely unretrievable unless the broilers can be sold during the week they are ready for slaughter.

45

When we make our production decisions, we do so with no knowledge of the demand which will exist for the product when it reaches marketable age, except for historical patterns and trends.

46

So much of present demand is affected by reduced consumer income that I am concerned now about how valid past trends are in today's economy. For instance, the demand of take-out stores is now sharply reduced. Takeout demand is a very real factor in the market and is directly affected by reduced consumer income.

47

Consumer demand for broilers fluctuates from week to week, with peaks and valleys in demand occurring in connection with, among other things, holidays and seasons of the year. How-

ever, at a given week, historical patterns and trends in demand may be modified by a variety of factors, many of which cannot be anticipated. For example, changes in weather conditions can affect our rate of broiler growth, and can also modify consumer demand in the market.

48

Because of the very limited shelf life of broilers sold fresh, all of our production must be sold within a maximum of 4 days from the time of slaughter. We must sell our products quickly and our customers demand a bird approximately 2¾ pounds, dressed weight. If birds back up in the field, and get over the desired weight, there is no question but that you have to sell these heavy birds at a discount because of their weight.

49

A further difficulty facing the integrated broiler operation such as ours comes from the fact that the bulk of our feed is delivered against payment by sight draft. On the other hand, we sell RTC broilers on a 14-40 day payment basis. This of course requires a substantial investment to finance accounts receivable and there is no way that a grower could cope with that sort of situation. The credit risk assumed by the broiler integrator is evidenced by the situation a year or so ago when Crenshaw Poultry on the west coast went bankrupt, costing the industry some one million dollars from failure to pay for chickens previously delivered. This bankruptcy took $27,000 to $30,000 from McCarty Enterprises.

50

Short run demand for broilers is strongly influenced by merchandising policies of our retail customers. Chicken specials, for example, sometimes doubles demand during the week of the special, but greatly reduces demand during weeks when chickens go off special.

51

Every broiler producer I know of operates in essentially the same way we do, owning or otherwise controlling hatching egg production, a hatchery, a feed mill or feed supply, contract growout of broilers and breeders, trucks and equipment for transporting chicks, feed and live broiler chickens and facilities for processing and marketing. Just about all broiler production today is carried on in this way by integrated producers.

/s/ H. F. McCARTY, JR.

Sworn to and subscribed before me this 28th day of April, 1975.

DORIS TUELOS
Notary Public

My Commission Expires May 16th, 1978

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF WILLIAM T. O'NEAL

(Filed May 1, 1975)

State of Georgia
County of Rabun

I, William T. O'Neal, after first being duly sworn, on oath depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 1, Box 215, Tiger, Georgia.

4

I am and have been since 1955 a contract broiler grower for Tom and Lee Arrendale, whose integrated broiler operation is now owned and operated as Fieldale Corporation.

5

I own and presently operate a 12,000 square foot broiler house, which will accommodate 15,000 to 16,000 birds per growout cycle.

6

Construction of my present house was completed in December, 1963. The construction cost was $8,153.00, and the equipment in the house cost a total of $4,780.71.

7

I built my first house in 1955 at a cost of $4,500.00. The capacity of that house is approximately 8,500. The old house has not been in use for the past three years, because a tornado took the roof off. The insurance took care of the loss, however, and I am repairing the house now for use this summer.

8

At the time I built my old house in 1955, I also began managing the cafeteria at the Clayton Elementary School. I have continued to manage the school cafeteria ever since that time. My salary from the Board of Education in 1974 was approximately $3,900.00.

9

In 1955, Tom and Lee Arrendale were operating Arrendale's Feed Store, and had a contract broiler growing program. In the early spring of the year, I went to see them to discuss the prospect of growing chickens for them. Tom Arrendale told me to go ahead and build the house, and he would give me a contract.

10

The equipment for my first house was selected and purchased for me by the Arrendales, and I believe they also helped install it. I paid the Arrendales for the equipment over a one year period.

11

During the 1950's and early 1960's, it took 10 to 11 weeks to grow out a flock of broiler chickens, and I would settle 3 or 4 flocks a year.

12

It now takes 7 to 8 weeks to grow out the birds, and I have been settling either 4 or 5 flocks a year for the last few years.

13

I built my new house in 1963 while the Arrendales' operation was owned by Ralston-Purina. The new house is a windowless, fan-ventilated house which was built on the Purina building program.

14

Under the Purina program, I was allowed credit of up to $5,000.00 for 90 days to purchase the equipment for the new house. At the end of 90 days, I borrowed the money to pay off the equipment from Mr. Arrendale's bank, the Bank of Habersham, and Tom Arrendale signed the note for me. The note was for a 7 year term.

15

Under my contract with Fieldale, I furnish the house, equipment, shavings (litter), labor, electricity, water and fuel. Fieldale puts in their chickens, and supplies all feed, medication, vaccines, and other health supplies, veterinary services, transportation, and labor and equipment for catching, cooping, loading and hauling the live birds to the processing plant.

16

The labor for our growout operation is a family affair, and my wife and I together perform all the labor.

17

There is no expense for water. We have a well, and the only expense connected with watering the chickens is the electric pump, which is included in with the electricity expense.

18

We hire some labor to clean out the chicken house at the end of each batch of chickens. We get that expense back, however, because we spread the litter on our pastures and it is worth more as fertilizer than the cost of what we pay for the shavings and what we pay for the cleanout combined.

19

My total farm consists of 141 acres, in one lot of 127 acres and another lot of 14 acres.

20

The land tied up by the two broiler houses is no more than 3 acres, including the land under the houses, some land around the houses, and the road necessary for the feed truck and pickup truck to get from the highway to the houses.

21

I grazed cattle on approximately 36 acres, and the remainder of my farm is in timber. I currently have 21 head of beef cattle.

22

The timber is commercial timber—about 15,000 white pines which I set out.

23

In my broiler growing operation, I have been on contract since the beginning.

24

My contract, first with the Arrendales, then with Ralston-Purina, and now with Fieldale, has always included a minimum guarantee.

25

I began in 1955 with a guarantee of 6 cents a head ($60.00 per 1,000), and I have always been paid more than the minimum.

26

In 1947 and 1948, I grew about 100 head or so of chickens on my own, and tried to market them myself. After buying the chicks, feeding them and raising them, my wife and I dressed them in the kitchen and sold them directly to consumers. We only tried raising chickens on our own for a year or two, and then quit, because you can't make any money doing that.

27

There is no way in the world I could grow chickens without a contract. I haven't got the capital, and I couldn't be in the business at all if the contractor didn't have the market.

28

As far as being a chicken farmer, I'm not. A farmer is always looking for a way to market. I'm not worried with that—that's their worry. All I've ever been is a grower on contract.

29

It has always been my understanding that I am guaranteed my payment, and that the contractor will take any loss.

30

I remember times when I was paid 6 cents or more a head for the chickens, and it was obvious to me from the cost of feed alone that the Arrendales were selling the broilers at a substantial loss. Nevertheless, I have always been paid well.

31

I have always made money growing chickens on contract. The only way I could not make money would be if the house were destroyed and the flock with it. In that situation, my insurance would cover the house and the equipment and all I would lose would be the labor up to that point.

32

In that same situation, Fieldale would lose its chickens, its feed, the medicines, vaccines and other supplies and its own labor and efforts in placing the flock and supervising.

33

I have always gotten regular placements, and I feel like I always will as long as I want them.

34

Under the present contract arrangement, I am paid on the basis of my cost of production efficiency within a range of 2.6 cents a pound and 3.6 cents a pound. The contract guarantees me a minimum of 2.6 cents per pound of broilers delivered to the plant, regardless of cost or efficiency, and my payment does not depend on market price.

35

In 1974, I settled 5 flocks with Fieldale, for a total gross payment of $8,437.56.

36

My estimated operating costs during 1974 in connection with broiler raising under contract to Fieldale was as follows:

Item	Annual Cost
Fuel	$815.87
Electricity	277.47
Insurance	143.00
House and equipment upkeep and maintenance	150.00
Taxes	87.41

All water expense is included in the electricity expense.

I paid approximately $600.00 for shaving (litter) during 1974, and also paid a total of $420.00 during the year for house cleanup after each flock. However, the litter removed after each flock was spread on my pasture, and the fertilizer value was at least the total of these two expenses.

The tax expense includes $76.91 ad valorem tax on the houses and equipment, and $10.50 estimated property tax. The total tax on the 127 acre tract which includes the broiler houses was $436.27, and only about 3 acres is tied up in broiler growing.

37

My 12,000 square foot house in which all broilers grown for Fieldale in 1974 were housed is being depreciated for tax purposes over a period of 15 years, at the rate of $542.00 a year. The equipment in that house was depreciated over a 3 year at the rate of $523.00 a year, and is already depreciated out. My 8,000 square foot house, which I have not used for the past 3 years, but which I will be using this summer, is being depreciated over a 20 year period at the rate of $225.00 a year. Thus my total depreciation expense for broiler houses and equipment in 1974 for tax and bookkeeping purposes was $767.00 including depreciation on the unused house.

/s/ William T. O'Neal

Sworn to and subscribed before me this 23rd day of April, 1975.

(Illegible)
Notary Public

My Commission Expires July 7, 1979.

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF A. C. SMITH

(Filed May 1, 1975)

State of Georgia
County of Forsyth

I, A. C. Smith, after first being duly sworn, on oath, depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Route 3, Cumming, Georgia, 30130.

4

I am the principal partner and chief executive officer of A. C. Smith Poultry Company, a Georgia partnership with its offices located at Silver City, Georgia. The other members of the partnership are my sons and daughter.

5

A. C. Smith Poultry Company is a member of Mar-Jac, Inc., an agricultural cooperative organized and existing under the Georgia Cooperative Marketing Act, whose members are integrated producers of broilers.

6

Mar-Jac, Inc. is a member of National Broiler Marketing Association. I am a director and one of the founders of National Broiler Marketing Association.

7

During 1967 I served as President of the Southeastern Poultry & Egg Association, an association of broiler and egg producers located throughout the southeastern United States. During 1971-1972, I was Chairman of the Board of National Broiler Council, a nationwide organization of broiler producers,

headquartered in Washington, D.C. I have general knowledge about the development of broiler production and current broiler practices in the United States.

8

I have been involved in broiler production since my father built a chicken house in Forsyth County in 1932. The house built in 1932 had a capacity of 500 chickens. Chicks were purchased from a hatchery located outside of Georgia, and my father purchased the feed ingredients from a feed dealer in Gainesville, Georgia. My mother and I took care of the chickens, and we mixed the feed ingredients in a wheelbarrow.

9

With respect to the chickens we raised, my family had the risk of selling the grown out birds in a fluctuating market, and also the risk of losing the chickens and our investment in chicks and feed. In the 1930's, we were lucky if we marketed one-half of the birds we started out with.

10

At the time we started growing chickens, my father was in the general merchandise business. In 1938 he became a feed dealer and entered into broiler production by contracting with other growers. My father was the second feed dealer in Georgia to enter contract productions; Jessee Jewell was the first.

11

Even in 1938, growers were generally unwilling to build broiler houses without a contract, and were unwilling to bear the marketing risks, which the feed dealers assumed under the contract arrangement.

12

I started in the broiler business for myself after I was discharged from the service in December, 1945.

13

In the early days of my business, I purchased feed from Purina or Pillsbury, and day-old broiler chicks from Chemell or Hall Brothers Hatchery.

14

I placed the chicks with growers for feeding under contract, and at the end of the growout period I collected the chickens and sold them to a processor.

15

My broilers are now and always have been raised by growers under contract, and I have always guaranteed my growers a minimum payment adequate to protect them against any loss. The guaranteed minimum when I began production in 1946 was $50.00 per 1,000 birds placed.

16

In 1947, I built a hatchery which I now own and operate as A. C. Smith Hatcheries, Inc. All broiler chicks placed by A. C. Smith Poultry Company are supplied by A. C. Smith Hatcheries, Inc.

17

The breeder flocks, which supply the hatchery with eggs, are owned and controlled by A. C. Smith Poultry Company.

18

A. C. Smith Poultry Company purchases day-old cockerel and pullet chicks from primary breeders and places them on a starter farm owned by a contract grower. This grower raises all our breeder chicks to an age of 5 or 6 weeks.

19

After 5 or 6 weeks, the breeder chicks are transferred to a growout farm, which is owned by A. C. Smith Poultry, Inc. The breeder growout farm is operated by a grower employed by A. C. Smith Poultry Company.

20

The breeders are raised on the growout farm to an age of 14 to 18 weeks, and then placed in breeder houses on 6 breeder farms owned by A. C. Smith Poultry Company, Inc. The breeders are maintained on these breeder farms throughout the productive period of lay for the hens, which is approximately 9 months. The breeder farms are operated by employees of A. C. Smith Poultry Company, Inc.

21

It is important for the integrator to maintain close control over his breeder operation in order to produce high quality chicks, because the quality of chicks is one of the most important factors in determining the quality of the broiler produced and marketed by the integrator. All integrated broiler producing operations of which I have knowledge own and control their own hatcheries and breeder flocks.

22

In 1949, I purchased a feed mill, which I operated as A. C. Smith Milling Company until 1966. The A. C. Smith Milling Company feed mill supplied all feed used in my integrated broiler operation, including both the hatchery supply flock and the growout operation, until 1966.

23

Since 1966, all feed used in my integrated broiler operation has been and is supplied by a feed mill owned and operated by HFC, Inc., a cooperative of agricultural producers owned and operated by the members of Mar-Jac, Inc.

24

Mar-Jac, Inc., a cooperative of which A. C. Smith Poultry Company is a member, owns and operates the processing facilities through which the live bird production of A. C. Smith Poultry Company is processed and marketed.

25

In our integrated broiler operation, A. C. Smith Poultry Company, either directly, by common ownership of A. C. Smith Hatcheries, Inc., or by membership in the Mar-Jac cooperative, raises the breeder chicks and produces the eggs which are hatched into broiler chicks; owns the broiler chick hatchery; owns the broiler chickens at all stages of production, including the growout period during which the chickens are cared for by contract growers; owns all feed and controls the mixture and content of feed used in growing out the broiler chickens; supplies and pays for all medications, vaccines, health supplies and veterinary services; makes all decisions with respect to the number of chicks to place, the length of the grow-out period, and the weight and size at which the broilers are to be marketed; supplies all transportation and catching, cooping and hauling labor; processes the chickens into ready-to-cook (RTC) broiler form; and bears the risk of selling the RTC broiler, a perishable product, on the open market.

26

The growers who raise A. C. Smith Poultry Company's broilers are guaranteed a payment adequate to protect them against any loss in growing out the broilers under contract.

27

The integrated A. C. Smith Poultry Company complex makes all decisions with respect to both the production and marketing of its broilers.

28

Under A. C. Smith Poultry Company's grower contract, the grower provides housing and equipment for feeding and watering the chickens, electricity, water, litter for the chicken house, and heating fuel.

29

During the cold weather months from December 15 through May 15, growers raising broilers under contract to A. C. Smith Poultry Company are paid a fuel allowance of $12.00 per 1,000 birds placed in addition to the compensation otherwise provided by the contract.

30

In addition to providing a fuel allowance, A. C. Smith Poultry Company will finance a grower's fuel cost from flock to flock, and fuel for approximately 15 to 20% of my growers is billed directly to A. C. Smith Poultry Company for payment. No interest is charged to the growers for such fuel financing.

31

During the winter months when the fuel allowance is in effect, the minimum payment a grower under contract with A. C. Smith Poultry Company can receive is 2.31 cents per pound, and the maximum is 3.31 cents per pound. During the non-winter months, when the fuel allowance is not in effect, the maximum grower payment is 3 cents per pound; the minimum payment is the guaranteed floor of 2 cents per pound.

32

Beyond the guaranteed minimum payment, compensation for growers under contract with A. C. Smith Poultry Company is calculated on a per pound basis from a scale which incorporates a factor for the grower's efficiency in converting feed to broiler

meat and a second factor for the prevailing market price at the time the birds are marketed by A. C. Smith Poultry Company.

33

A. C. Smith Poultry Company produces broilers at a fairly constant level, with only two annual production adjustments. The processing plant operated by Mar-Jac, Inc. shuts down during the weeks of Thanksgiving and Christmas. No new flocks of broilers are placed during the two one-week periods at which time the birds would be placed in order to be ready for slaughter during Thanksgiving week and Christmas week. The placement with growers of flocks which would be placed during those weeks in the normal placement cycle are delayed one week in their placement.

34

Flocks are replaced with all growers in sequence, and each grower under contract with A. C. Smith Poultry Company settles (receives payment for) an average of 4½ flocks per year.

35

Except for the Christmas and Thanksgiving week placements, flocks are replaced within ten days to two weeks for all growers continuing under contract.

36

The number of growers under contract to A. C. Smith Poultry Company has remained fairly constant throughout each year, and from year to year. Most of our turnover is with inefficient growers who will try it for a year or two with us, and move to another company. These are growers who will not perform according to the requirements of the contract, and therefore don't handle the growout efficiently from the standpoint of costs to the integrated producer.

37

A grower who builds a broiler house in Forsyth County and does a competent job of performing under his contract should have no difficulty in getting chickens to raise for some integrator on a regular basis. There are at least seven integrated broiler production programs placing chickens in Forsyth County: A. C. Smith Poultry Company, Wilson & Co., Inc., Allied Mills, Inc., J & M, Helen Feed Store, Marell Poultry Company and Cagles, Inc.

38

I know of no grower who has had to close his chicken houses because of bankruptcy. All competent growers raising chickens for an integrated producer who has gone bankrupt or has otherwise gone out of business in Forsyth County have had no trouble getting on with other integrated programs.

39

There have been a substantial number of bankruptcies and withdrawals from the broiler business by integrated producers in Forsyth County.

40

In the 1940's and 1950's, there were 15 or 20 feed dealers located in Forsyth County who produced broilers through contract arrangements with growers. During the period 1959 through 1963, particularly in the latter part of that period, all but approximately 5 of those feed dealers went out of business.

41

After 1967, only 3 of the Forsyth County integrated producers remained in business, and one of those has recently withdrawn. There are presently only 2 integrated producers, A. C. Smith Poultry Company and Wilson & Co., Inc. still operating from locations in Forsyth County.

42

Despite the substantial number of bankruptcies and withdrawals from the broiler business by integrated producers, I don't know of any competent growers who have been out of chickens for any substantial length of time. At least 5 integrated producers located in other counties are currently placing chickens with Forsyth County growers.

43

Servicemen who are employees of A. C. Smith Poultry Company visit the contract growers at least once a week, to oversee the conditions and supervise the manner under which the chickens are being grown. The servicemen prescribe the proper temperature and ventilation of the broiler houses, and the grower is expected to notify the serviceman if a problem arises such as equipment failure or development of an abnormally high mortality rate.

44

The A. C. Smith Poultry Company growout agreement requires the grower to cooperate with his serviceman and to heat and care for the broilers according to the recommendations of the serviceman.

45

Employees of A. C. Smith Poultry Company place the day-old chicks in the growers' houses, and remove the chickens at the end of the growout. Unless hired and paid specifically for the purpose, A. C. Smith Poultry Company growers are not required or expected to assist in catching and cooping the chickens at the end of the growout.

46

Once the chicks are started—after 10 days or 2 weeks—the growers' efforts largely consist of being physically present

in the houses several times a day to observe the chickens, to record and monitor mortality rates, and to make certain that the feeders, brooders (heaters), and ventilation and watering systems are in working order.

47

Contract broiler growing is a sideline with many growers, constituting a supplement to other farm, or off-farm, income. Broiler growing complements cattle raising very well, because it provides a steady income and the poultry manure and litter from the broiler houses provide a high quality fertilizer for grazing land.

48

Most broilers processed and marketed through Mar-Jac, Inc. are sold in fresh, ice or CO_2 packed form.

49

In commercial practice, ice-packed and chilled broilers must be sold to the ultimate consumer within seven days after they are slaughtered.

50

As a practical matter, in marketing fresh broilers Mar-Jac must find a buyer for all product no later than four days after slaughter.

51

Most demand for fresh broilers from distributors, wholesalers and consumers is for dressed broilers ranging in weight from approximately 2 to approximately 3½ pounds.

52

Birds in the field which are not slaughtered when they reach desirable market weight continue to consume feed, increasing the cost of production to the integrated producer.

53

In addition to the increased production costs for birds heavier than desirable weights, the heavy birds must be discounted from the prevailing market price for normal or desirable weight birds. Thus, as a practical matter, birds in the field cannot be withheld from slaughter more than one or two days after they reach marketing weight.

54

The integrated producer buys and places breeder flock chicks 12 to 18 months in advance of the date when the broilers produced from the eggs laid by the breeder flocks will be marketed.

55

Once breeder chicks are placed, adjustments in production can be made by the integrated producer only at the sacrifice of some or all of his expected return from the breeder flocks started, raised and placed for laying in the breeder houses.

56

Production adjustments after breeder chicks are placed require either (a) removing some breeder hens from production; (b) diverting broiler chick eggs from production prior to the hatchery stage; or (c) killing the broiler chicks after hatching but prior to placement for the growout.

57

A decision to cut back production using any of the methods described in the preceding paragraph requires the sacrifice of the integrated producer's investment in the laying flock and hatchery up to the point of decision and removal from production.

58

After the broiler chicks are placed for growout, 7 to 9 weeks prior to slaughter, no significant adjustment in production is

possible. Thus, production decisions cannot be made on the basis of market facts and conditions available to the integrated producer any closer to the marketing date than the 7 or 8 weeks required for the growout.

59

The development of contract broiler production has been important to the rural population of north Georgia because of the limited agricultural alternatives. The north Georgia terrain prevented widespread mechanization of cotton picking, and cotton producers were unable to make money as labor costs increased.

60

Commercial broiler production on a large scale was initiated in the late 1930's by integrated feed dealers like Jesse Jewell and my father, who assumed the risk of marketing the broilers and providing the growers with a reasonable income on a regular basis.

61

Feed has always been the largest cost element in the production of live broiler chickens, and the integrated producer has always borne the risk of loss of that investment as well as the marketing risk.

62

Today, almost all integrated broiler production programs in north Georgia combine the hatchery and hatchery supply flock, the feed supply, the contract growing operation and the processing and marketing facilities into a single functional complex.

63

The major investor, and the principal risk-bearer, in broiler production is the integrated producer, who supplies between 85 and 95% of the total investment which goes into a unit of broiler meat production.

64

The contract grower is an important part of the integrated broiler production enterprise, but the decision-making function, the market risk and the major investment in broiler production is controlled almost exclusively by integrated producers like A. C. Smith Poultry Company.

Further deponent sayeth not, this 25th day of April, 1975.

/s/ A. C. SMITH

Sworn to and subscribed before me this 25 day of April, 1975.

MARY CASTLEBERRY
Notary Public,

State of Georgia
Forsyth County

My term expires 8-10-76.

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF THOMAS W. SPARKS

(Filed May 1, 1975)

State of Mississippi
County of Simpson

I, Thomas W. Sparks, after first being duly sworn, on oath depose and say:

1

I make this affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment made in this action.

2

I know of my own personal knowledge the facts stated in this affidavit.

3

My residence is Box 148, Magee, Mississippi.

4

I am Vice President of McCarty Poultry Farms, Inc. and also Vice President of McCarty Hatcheries, Inc. These two corporations are known and operated under the trade style McCarty Enterprises.

5

I am in charge of live bird production for McCarty Enterprises, and I have general responsibility for all phases of live bird production from the breeder stage through delivery of live birds to the processing plant.

6

McCarty Enterprises owns two starter farms, where breeder chicks are placed and raised by McCarty employees to an age of 8 weeks.

7

At the age of 8 weeks, the breeder pullets and cockerels are moved to 3 separate company-owned growing farms, where they are raised by McCarty employees to an age of 20 to 22 weeks.

of the hatchery, or by destroying chicks hatched from eggs set in the hatchery.

19

All of the alternatives for decreasing production once the production cycle begins constitute a loss of investment committed to the hen, egg or chick at the time it is taken out of production.

20

The number of eggs set in hatcheries at a given time generally determines the number of day-old chicks available for placement three weeks later, and thus the number of broilers which will be available for slaughter 10 to 12 weeks later.

21

The integrated producer's last opportunity to alter the number of broilers ready for slaughter in a given market week is the time at which day-old chicks are placed with growers, which occurs 7 to 9 weeks prior to the marketing date. Once chicks are placed with growers, they must be slaughtered and marketed when they arrive at market weight between 7 to 9 weeks later. Thus, significant adjustments in levels of production cannot be made without at least 7 to 9 weeks lead time.

22

Birds which are not slaughtered when they reach desirable market weight remain in the field consuming feed and increasing the production cost above normal, even though the heavier bird must normally be sold at a discount from the prevailing price for birds marketed at the desirable weight.

23

Almost all of McCarty's contract growers derive some income from other sources, either from cattle, hogs or other farming activities or from off-farm employment. Much of the

day-to-day performance of the broiler growout contract is frequently carried on by the women, children or other relatives in the grower's family.

24

In addition to my employment as Vice President in charge of production for McCarty Enterprises, I also own and operate three broiler houses, with a total capacity of 45,000 birds per cycle, under a standard grower contract with McCarty Poultry Farms, Inc.

25

I built and equipped two of my houses in 1961, at a cost of $.60 per square foot, for a total of approximately $18,000 for the two of them. I built my third house in 1969 at a cost of approximately $.75 per square foot, for a total cost of approximately $11,250.00.

26

All labor in connection with the growing of broilers under contract in my growout operation is performed by an elderly hired couple for whom I furnish a dwelling house with all utilities paid and a $75.00 per week year-round salary.

27

My total farm consists of 52 acres, of which no more than 4 or 5 acres is involved in the broiler growout operation. I graze cattle on the remaining acreage.

28

My growout operation was not affected by the Dieldrin contamination. At the time the contamination was discovered, the chickens in my houses were only a week or so old. The Dieldrin contamination cutoff was three weeks of age, and birds less than three weeks of age at the time were not required to be destroyed.

29

The Dieldrin contamination resulted in destruction of approximately six weeks of McCarty Enterprises' production and affected approximately ⅔ of McCarty's growers.

30

All growers raising flocks required to be destroyed were paid the 6½ cent minimum payment for each bird placed with them, regardless of the age at which the contaminated birds were destroyed.

31

The resulting loss to McCarty Poultry Farms, Inc. was in excess of $1.5 million.

32

The 6½ cent per bird payment was adequate to cover the fixed costs, out-of-pocket expenses and most if not all labor invested in the flocks by the contract growers.

33

Integrated broiler production is the salvation of the small farm.

34

The broiler growing area of Mississippi is generally made up of small farms. It used to be a cotton and truck farming area; however, cotton production dried up, and truck farming went to the larger farms, because labor costs went up and the small farmer could not afford the equipment to mechanize.

35

Contract growing provides a regular income, and allows the farm family to stay on the farm rather than leaving in search of industrial or other off-farm employment.

36

In my personal poultry growout operation, I settled five flocks in 1973 for a total gross payment of $21,658.46. In 1974, I settled four batches for a total payment of $14,573.14.

37

I estimate the annual operating costs in connection with my contract broiler raising operation as follows:

Item	Annual Cost
Fuel (Butane gas)	$1,435.40
Electricity	305.31
Insurance	354.85
Taxes	13.42
House and equipment upkeep and maintenance	2,353.29
Labor	5,113.82

McCarty Poultry Farms, Inc. furnishes all litter used in the operation.

All expense for water is included in the electricity expense.

38

I am depreciating my broiler houses for tax and bookkeeping purposes over a 10-year period, and the equipment is being depreciated over a 10-year period, both on the straight line method. The equipment in my first two houses, built in 1961, depreciated out in 1971. Thus, my annual depreciation expense for 1973 was $3,362.89, and for 1974 it was $3,452.22.

/s/ THOMAS W. SPARKS

Sworn to and subscribed before me this 21st day of April, 1975.

DORIS TUELOS
Notary Public

My Commission Expires May 16th, 1978

In the United States District Court for the Northern District of Georgia, Atlanta Division

(Title omitted in printing)

State of Georgia
County of Glynn

AFFIDAVIT OF COLLIER WENDEROTH

(Filed June 23, 1975)

Comes now Collier Wenderoth, who, after first being duly sworn, on oath deposes and says the following:

1

I make this affidavit for use by National Broiler Marketing Association in support of its motion for summary judgment in the above-referenced action.

2

I am President of O.K. Feed Mills, Inc., Fort Smith, Arkansas, which is a member of National Broiler Marketing Association. O.K. Feed Mills along with O.K. Processors, Inc., an affiliated company under common family ownership, constitute

an integrated broiler producing complex combining hatchery supply flocks, hatchery, feed mill, broiler grow out through contractual and company owned facilities, and broiler processing and marketing.

3

Under our contractual arrangement with our growers, our contract specifies that when baby chicks, feed, grit, medications and vaccines are delivered to the grower, they are also sold to the grower.

4

At the time we deliver the chicks, feed, vaccines, medications and sanitation products to the grower, however, there is no cash paid by the grower to O.K. Feed Mills and no money changes hands, at that time whatsoever. Instead the grower signs a note payable to O.K. Feed Mills, which O.K. Feed Mills, then discounts with recourse to a local bank or the local Production Credit Association where we have lines of credit. The sole purpose for the contractual provisions relating to the sale of chicks, feed, medication, etc. is this method of financing. The notes are paid and returned at the end of the grow out period. We have never called on a grower to pay the note and we have never paid a grower less than the amount of the note.

5

We feel we are morally obligated, although we are not contractually obligated, to pay a grower in the event of partial or complete loss of his flock due to disaster, such as flood, windstorm, or the like. For instance, if at the end of the fifth week of a seven week grow-out period one of our growers loses his flock as a result of windstorm, we pay him 5/7ths of the minimum payments he would have received had the birds grown the full seven weeks. We have always paid our growers in this fashion in this kind of situation.

6

Our contract provides that O.K. Feed Mills, and not the grower suffers the loss of investment in the chicks, feed, vaccines, medications and sanitation products which we have delivered to the grower in the event of such a disaster loss. Therefore in the event of a disaster we take all of the out of pocket loss.

/s/ COLLIER WENDEROTH

Sworn to and subscribed before me this 16th day of June, 1975.

ANNE C. NOEL
Notary Public, Georgia, State at Large

My Commission Expires Nov. 30, 1977

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

AFFIDAVIT OF RONALD M. CAMERON

(Filed June 23, 1975)

State of Arkansas }
County of Pulaski }

Comes Now Ronald M. Cameron who having been duly sworn on oath deposes and says the following:

1

I am President of Mountaire Corporation, an integrated producer of broilers, located in Nashville, Arkansas, which is a member of National Broiler Marketing Association.

2

I make this Affidavit for use by National Broiler Marketing Association in support of its Motion for Summary Judgment in this action.

3

Under the broiler growing agreement which our company enters into with contract growers [M-46], we provide in part that:

> "it is agreed that Company and Grower shall have joint ownership of all poultry and both shall sign the PCA loan paper. Proceeds of the PCA loan shall be paid to the Company always and Company guarantees the timely repayment of all principal and interest of said loan. When the said PCA loan is repaid by the Company, then the poultry shall immediately become the sole property of the Company."

The reason for this contract arrangement is to facilitate loans from our local Production Credit Association. At the time we deliver baby chicks to the grower and deliver feed to the grower during the grow-out period, the grower makes no payment to Mountaire. At the end of the grow-out period the growers are not charged for the birds, feed, etc. Instead, Mountaire calculates comparative grower costs for all growers for the same grow-out period in order to determine what amount per pound of broilers the grower payment will be. Therefore, a grower is never required to pay Mountaire anything for a grow-out period and Mountaire always pays the grower at least the minimum amount per pound guaranteed by the contract.

4

Should a flock be destroyed by disaster, such as tornado, high wind, etc., the entire risk of loss of the chicks, medication and feed which we have delivered to the grower is borne by Mountaire and not by the grower.

5

I understand that the usual integrator contract provides that title to the chicks and feed remain in the integrator. As I said above, we use the contract provision quoted simply as a financing method. Except for financing, the quoted contract provision does not make our situation any different from the situation where the integrator retains full title to the chicks and feed, with respect to the economic or cash position, or risk of loss, as between any integrator and the grower.

/s/ RONALD M. CAMERON

Sworn to and subscribed before me this 18th day of June, 1975.

LINDA H. CHISENHALL
Notary Public

In the United States District Court for the
Northern District of Georgia
Atlanta Division

(Title omitted in printing)

OBJECTIONS
To the Admissibility of Affidavits Submitted by NBMA in Support of Its Motion for Partial Summary Judgment

(Dated June 6, 1975)

Rule 56(e), Federal Rules of Civil Procedure, requires that affidavits furnished in support of a motion for summary judgment "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Plaintiff submits that certain of the affidavits or portions of affidavits relied on by NBMA do not meet this requirement of Rule 56(e), and objects to their admission in connection with NBMA's motion, as follows:

1. **Affidavit of Leroy Emerson Mayfield**

¶ 32, ¶ 34. The affidavit does not establish that affiant has personal knowledge of A. C. Smith's broiler operations, as opposed to his own growing operations.

2. **Affidavit of James Archie Martin**

¶ 23. The affidavit does not establish that affiant has personal knowledge of A. C. Smith's broiler operations.

3. **Affidavit of J. Troy Copeland**

¶ 22. The affidavit does not establish that affiant has personal knowledge of Fieldale's broiler operations.

4. **Affidavit of Maurice Layton**

¶ 23. The affidavit does not establish that affiant has personal knowledge of the financial conditions of other broiler growers.

5. **Affidavit of Ford Barrett**

¶ 19, ¶ 20, ¶ 21, ¶ 22. The affidavit does not establish that affiant has personal knowledge of A. C. Smith's broiler operations.

6. **Affidavit of Kirk H. Davis**

¶ 26. The affidavit does not establish that affiant has personal knowledge of the financial conditions of other broiler growers.

7. **Affidavit of William T. O'Neal**

¶ 32. The affidavit does not establish a basis that affiant has personal knowledge of Fieldale's broiler operations.

8. **Affidavit of Dr. Verner G. Hurt**

Dr. Hurt's affidavit does not set forth any facts establishing his expertise with respect to the broiler industry. The affiant has not, as far as the affidavit discloses, conducted specific studies or personally engaged in research involving the industry. Nor does the affidavit disclose experience in the operations of specific firms involved in the industry. Accordingly, we object to the admission of this affidavit in its entirety, on the ground that it establishes no foundation that would permit Dr. Hurt to testify either on the basis of personal knowledge or as an expert in the broiler industry.

9. **Affidavit of A. C. Smith**

¶ 26. The affidavit does not establish that affiant has personal knowledge of the costs incurred by every grower connected with his operations.

¶ 37, ¶ 38. The affidavit does not establish that affiant has personal knowledge of the degree of difficulty that growers may have in getting contracts with firms other than his own.

10. **Affidavit of Bob M. Anthony**

¶ 23, ¶ 24. Insofar as the affiant is saying that each member of NBMA is involved in every operation listed in ¶ 24, the affiant has not established a basis for showing his familiarity with the operations of each and every member of NBMA.

¶ 26. The affidavit does not establish that affiant has personal knowledge as a basis for testimony about the purposes of U.S.D.A. programs.

11. **Affidavit of H. F. McCarty, Jr.**

¶ 18. The affidavit does not establish that affiant has personal knowledge of the costs incurred by each of his growers.

¶ 27. The affidavit does not establish that affiant has personal knowledge of the incomes or standards of living realized by factory workers.

¶ 40. The affidavit does not establish that affiant has personal knowledge of the financial status or motivation of all broiler growers located in his area of Mississippi.

12. **Affidavit of Richard C. Larkin**

¶ 20. The affidavit does not establish that affiant has personal knowledge of the matter testified to.

¶ 32, ¶ 33. This testimony is objected to as hearsay. Statements contained in a book, obviously hearsay, do not become admissible because a witness says that he is in "general accord" with those statements.

Respectfully submitted this 6th day of June, 1975.

/s/ CHARLES S. STARK
/s/ LARRY R. PATTON
/s/ ELLIOT R. WARREN
Attorneys, United States
Department of Justice

No. 77-117

Supreme Court, U. S.
FILED
SEP 20 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL BEDDING MANUFACTURING ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

JOHN H. SHENEFIELD,
Acting Assistant Attorney General,

JOHN J. POWERS, III,
BRUCE E. FEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statutes involved 2

Statement 2

Argument 4

Conclusion 11

CITATIONS

Cases:

Bayside Enterprises, Inc. v. *National Labor Relations Board*, 429 U.S. 298 5

Cantor v. *Detroit Edison Co.*, 428 U.S. 579 5

Case-Swayne Co. v. *Sunkist Growers, Inc.*, 389 U.S. 384 ..... 3, 7, 9-10

Federal Trade Commission v. *Bunte Bros., Inc.*, 312 U.S. 349 11

Maryland and Virginia Milk Producers Association, Inc. v. *United States*, 362 U.S. 458 ..... 3, 7, 10

Otter Tail Power Co. v. *United States*, 410 U.S. 366 10-11

United States v. *Borden Co.*, 308 U.S. 188 ..... 3, 10

Statutes and regulation:

Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. 2301 *et seq.* 10

Capper Volstead Act, 42 Stat. 388, 7 U.S.C. 291-292 ..... *Passim*

Page

Statutes and regulation:

Clayton Act, Section 6, 38 Stat. 731, 15 U.S.C. 17 3

Cooperative Marketing Act of 1926, Section 5, 44 Stat. 803, 7 U.S.C. 455 3

Sherman Act, Section 1, 26 Stat. 209, as amended, 15 U.S.C. 1 .....2, 10

28 C.F.R. 50.6 5

Miscellaneous:

Broiler Business (October 1976) 6

59 Cong. Rec. 7855-7856 (1920) 8

62 Cong. Rec. 2048 (1922) 8

62 Cong. Rec. 2050-2051 (1922) 8

62 Cong. Rec. 2058 (1922) 8

62 Cong. Rec. 2060 (1922) 7

62 Cong. Rec. 2274-2275 (1922) 7

Hearings on S. 109 (Agricultural Producers Marketing Act) before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90 Cong., 1st Sess. (1967) 10

H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921) 6, 7

Landes and Posner *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875 (1975) 7

S. Rep. No. 90-474, 90th Cong., 1st Sess. (1967) 10

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-22) is reported at 550 F. 2d 1380. The opinions of the district court (Pet. App. A-23 to A-36) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-37) was entered on April 22, 1977. The petition for a writ of certiorari was filed on July 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether poultry processors that neither own nor operate farms but that contract with others to feed and

raise chickens are "engaged in the production of agricultural products as farmers" within the meaning of the Capper-Volstead Act, 7 U.S.C. 291.

STATUTES INVOLVED

The pertinent portion of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, is set forth at Pet. 2. The Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291-292, is set forth at Pet. App. A-5 to A-7 n. 5.

STATEMENT

Petitioner is a marketing cooperative composed primarily of vertically integrated broiler producers known as "integrators." Most integrators own breeding flocks of chickens that lay eggs, which hatch into chicks. The integrators take the chicks to independent contractors or "growers" that tend them during the "grow-out phase" while the birds become large enough to eat. The growers own the land and buildings in which the grow-out process occurs, and they supply the necessary labor. The integrators supply and own the birds, and they also supply the necessary feed and veterinary services. At the end of a prescribed period the integrators retrieve the chicks and prepare them for sale. See generally Pet. App. A-4 to A-5.

The members of the cooperative routinely exchange price information and attempt, in other ways, to ensure a market at stable prices for their products. On April 16, 1973, the United States commenced this civil antitrust action against petitioner, contending that it represented a combination of its members in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner contended that its activities were lawful because it is an agricultural cooperative that is largely exempt from the antitrust laws by virtue of the Capper-Volstead Act, 7 U.S.C. 291-292.

The Capper-Volstead Act exemption applies to "[p]ersons engaged in the production of agricultural products as farmers * * *."[1] Petitioner contended that the integrators produce the broilers from egg to market and consequently are "farmers." The district court agreed. The court reasoned that the integrators bear most of the economic risk in the process of producing broiler chickens for market and that the integrators consequently should be treated as the "farmers."[2]

The court of appeals reversed (Pet. App. A-1 to A-22). The court concluded that the Capper-Volstead Act's reference to "farmers" included a smaller group than "all

---

[1]The exemption is not total. See *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 362 U.S. 458, 465-467; *United States* v. *Borden Co.*, 308 U.S. 188, 204-206. In its amended complaint (see note 2, *infra*), the United States does not allege that petitioner engaged in any practices that would not be exempt if the integrators are "farmers," however, so that the reach of the antitrust laws to Capper-Volstead "farmers" therefore is not in issue here.

The Capper-Volstead issue also controls petitioner's claim to antitrust exemption under Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 17, since that statute provides protection coextensive with Capper-Volstead immunity. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 391.

[2]The district court initially granted petitioner's motion for partial summary judgment; after the United States filed an amended complaint eliminating additional issues, the court entered a final judgment to permit appellate review. The court did not reach petitioner's argument that Section 5 of the Cooperative Marketing Act of 1926, 44 Stat. 803, 7 U.S.C. 455, furnished a defense to the antitrust charges.

The parties have stipulated (R. 567, 574) that after resolution of the Capper-Volstead issues a new complaint may be filed to revive any other issues that remain open. ("R." refers to the joint appendix in the court of appeals. Petitioner has lodged a copy of this appendix with this Court.)

persons engaged in the production of agricultural products"; it held that petitioner's members, although engaged in the production of agricultural products, are not "farmers."

The court first took an ordinary-language approach to the statute and explained that "[w]hatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership" (Pet. App. A-13). The integrators do not own the places where the broilers are grown and do not tend them during the grow-out phase. The court of appeals therefore turned to the legislative history of the Capper-Volstead Act to determine whether Congress intended to exempt from the antitrust laws a group broader than those ordinarily understood to be "farmers."

The court concluded that the Capper-Volstead Act had been designed to grant special advantages to small farmers in order to improve their position vis-a-vis middlemen. The court observed that Congress had defeated an amendment that would have extended the Act's protection to integrated processors (like sugar processors that turn agricultural products into refined sugar) that entered into pre-planting contracts with growers (Pet. App. A-17 to A-18). Since petitioner's members fall closer to the sugar processors that are outside the Act than to the ordinary understanding of "farmers," the court concluded, they could not be the beneficiaries of the Act.

ARGUMENT

The decision of the court of appeals is one of first impression. There is no conflict among the circuits, and the court of appeals has tracked this Court's analogous decision that drivers employed by integrated poultry producers are not farmers for purposes of exemption from the

National Labor Relations Act. *Bayside Enterprises, Inc.* v. *National Labor Relations Board*, 429 U.S. 298.

Petitioner's major argument is that broiler production and marketing is a major industry that will be affected throughout the nation by this decision, since it applies to a nationwide cooperative of integrators. Review of the present case is necessary, petitioner argues, because there can never be a conflict among the circuits with respect to broiler integrators (Pet. 9-10, 13).[3]

---

[3]Petitioner also seems to argue (Pet. 6-7) that the Court should grant review because it was misled by the Department of Justice into believing that its operations would be lawful, yet now finds itself facing substantial monetary liability if the decision below is allowed to stand. This argument is itself misleading.

In 1969 the Department issued a business review letter to the National Egg Co., expressing an intent not to institute a criminal prosecution of a cooperative that planned to admit a corporation that contracted with farmers for the care of laying hens and the production of eggs. The letter was issued pursuant to a procedure for the review of particular proposed actions on a case-by-case basis. The Department expressly reserves the right to change its mind and institute a prosecution if the public interest should so require (28 C.F.R. 50.6).

Petitioner was formed in 1970. It did not seek approval pursuant to the business review procedure. On November 17, 1971, the Department issued a business review letter to Holly Farms Poultry, Inc., concerning Holly's proposal to join petitioner. The business review letter stated that integrators that contracted out for the growing of broilers were not themselves farmers within the meaning of the Capper-Volstead Act, and in a simultaneous press release the Department took the position that agricultural cooperatives might forfeit their limited antitrust exemption if they admitted integrators.

Although petitioner was thus on formal notice of the Department's legal position, it continued to operate as before. The Department brought suit in 1973. Since the Department seeks only an injunction against petitioner's marketing practices, petitioner is not entitled to defend on the ground that it was "mislead." Whether such a defense would be valid in a treble damages action is a question that need not be faced in this case. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-595.

Petitioner's argument is unpersuasive. Whenever a particular combination in restraint of trade is alleged to violate the antitrust laws, there cannot be a conflict among the circuits with respect to that particular combination; *res judicata* ensures that there will be only one decision, unless private cases should reach other courts of appeals. As petitioner concedes (Pet. 13), the same legal issue easily could arise with respect to other agricultural products (or even with respect to other poultry marketing associations), and such suits may be brought in other courts. The claim, therefore, is not a sufficient reason to grant review in the present case.[4]

1. The court of appeals correctly held that the language and legislative history of the Capper-Volstead Act establish that it provides only a narrow antitrust exemption limited to persons who own or operate "farms." The statute's language was carefully chosen to make the exemption narrower than one that would have covered all "agricultural producers"; the language Congress used excludes all but "actual farmers" (H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921)) from the Act's coverage.

---

[4]Petitioner's assertion (Pet. 10-13) that the decision of the court of appeals portends immediate and far-reaching consequences in the poultry industry is speculative. The decision permits integrators to maintain their operating structure so long as they avoid fixing prices or otherwise violating the antitrust laws. Whether integrators now will enter the grow-out phase of broiler production, as petitioner contends (Pet. 11-12), will turn on countless legal, economic and other factors in addition to the interpretation of the Capper-Volstead Act. Integrators might hesitate to become farmers because of the capital investment required (R. 532) and the lower productivity of farm employees as opposed to independent farmers (Broiler Business, October 1976, pp. 10-11). Petitioner also retains the option of seeking relief from Congress if it believes that integrated agricultural producers should be immune from antitrust liability.

The Act does not reach persons who do not own or operate "farms" in the traditional sense. Congress defeated a proposed amendment that would have extended the antitrust exemption to integrated producers that, like petitioner's members, prepare agricultural products for market but do not own or operate the farms on which the products are raised. See Pet. App. A-17 to A-18; *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 392 n. 9.

Petitioner contends that this represents a romantic view of farming in a day when most agricultural operations are carried on by large integrated producers (Pet. 10-11). Perhaps that is so. But we believe that there is overwhelming evidence that Congress passed the Capper-Volstead Act with just such a view, and we submit that its decision to limit the scope of the antitrust exemption to ordinary "farmers" should be respected.[5]

Congress artfully crafted the Capper-Volstead Act to advance two overriding goals. The first was to increase farmers' income at the expense of middlemen but not consumers.[6] This could be accomplished, in the judgment of Congress, by providing antitrust immunity to farmers collectively engaged in processing or marketing agricultural produce, while denying such immunity to persons who might injure consumers or competitors.[7] Second,

---

[5]See, *e.g.*, Landes and Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875, 877, 883, 894 (1975).

[6]*Case-Swayne Co.* v. *Sunkist Growers, Inc.*, *supra*, 389 U.S. at 393; H.R. Rep. No. 24, 67th Cong., 1st Sess. 2 (1921); 62 Cong. Rec. 2060 (1922) (remarks of Senator Capper); *id.* at 2274-2275 (remarks of Senators Kellogg and Norris); *id.* at 2275 (defeat of the Phipps amendment).

[7]*Maryland and Virginia Milk Producers Association, Inc.*, *supra*, 362 U.S. at 466-467.

Congress sought to encourage farmers to remain on their land and thus to preserve traditional farm life.[8] The traditional farmer was viewed by many as the backbone of the Nation's economic and social individualism, and as the foundation of its democratic institutions.[9]

Extending antitrust immunity to petitioner would not serve these goals. The integrators do not raise chickens; they contract with others to do so.[10]

The independent growers with whom the integrators contract invest in land, buildings, equipment, and labor to raise chickens (R. 393-394). This investment may exceed an integrator's aggregate investment in breeder flocks, hatcheries, and processing facilities (R. 393).

Moreover, independent growers assume, in addition to their contribution of labor and capital, a substantial portion of the business risks involved in raising broilers. Some contracts with integrators provide (R. 398-399): (1) that the grower pay taxes on the chickens and the cost of feed, grit, litter, fuel and sanitation products; (2) that

[8]Petitioner's assertion (Pet. 16) that Capper-Volstead supporters eschewed any special concern for the individual farmer is erroneous. The debates are replete with references to the desirability of preserving the family farm and of limiting Capper-Volstead protection to the man who tills the soil. See, *e.g.*, 59 Cong. Rec. 7855-7856 (1920) (remarks of Congressman Evans); 62 Cong. Rec. 2048, 2050-2051 (1922) (remarks of Senator Kellogg).

[9]62 Cong. Rec. 2058 (1922) (remarks of Senator Capper); *id.* at 2050-2051 (remarks of Senator Kellogg).

[10]Petitioner's claim of antitrust immunity fails if any member is not a "farmer." *Case-Swayne Co.* v. *Sunkist Growers, Inc., supra.* Petitioner's assertion (Pet. 17) that all of its members are engaged in more than the processing of broilers is erroneous; two of its 32 members neither own nor operate farms and "do not own or control any breeder flocks, hatcheries or feed mills, either" (R. 392).

the grower absorb chick losses in excess of five percent; (3) that the grower pay damages for lost profits due to chick casualties caused by grower negligence; or (4) that feed losses be split between the member and grower if chicks die in the event of fire or natural disaster. Several contracts tie the grower's payment to the market price of broilers and the integrator's costs of supplying feed or services (R. 395-396). The independent growers thus bear a substantial part of the risks traditionally associated with farming.

2. Petitioner dwells upon its members' financial interest in the chicks. But this Court has rejected the view that persons with a financial stake in agricultural production automatically qualify as "farmers." *Case-Swayne Co.* v. *Sunkist Growers, Inc., supra*, 389 U.S. at 394. The integrators, unlike the growers, do not bear the risks of investment in land and buildings that are unique to farming. The integrator's risk is limited to the cost of each group of chicks and to the necessary feed, medicines and veterinary services (Pet. 4) during one growing cycle of seven to nine weeks.[11] An integrator may decline to renew a grower's contract after each cycle (R. 397-398), leaving the grower with an investment that cannot readily be shifted to other endeavors.

3. Petitioner's inventive interpretation of the Capper-Volstead Act is inconsistent with the well-established principle that antitrust exemptions, including that created by that Act, should be narrowly construed. *Case-Swayne,*

[11]Petitioner's attempt (Pet. 14-15) to analogize integrators to farm owners who use tenant farmers to produce crops is flawed in at least two respects. First, the owner's investment in farm land is fixed in a way similar to the growers rather than to the integrators. Second, the farm owner, unlike the integrator, assists in the preservation of traditional farm life.

Co. v. *Sunkist Growers, Inc., supra,* 389 U.S. at 393; *Maryland and Virginia Milk Producers Association, Inc.* v. *United States,* 362 U.S. 458, 466-467; *United States* v. *Borden Co.*, 308 U.S. 188, 198, 204-206. As the court of appeals noted (Pet. App. A-22), arguments that the list of persons eligible for the antitrust exemption should be extended must be directed to Congress rather than the courts.[12]

4. Petitioner contends (Pet. 17-18) that the court of appeals failed to give controlling weight to the views of the Department of Agriculture and the Farm Credit Administration concerning the status of integrators. But neither agency has ever expressed an opinion on the antitrust issue in this case or claimed any authority to do so.[13] Nothing in either the language or the legislative history of the Capper-Volstead Act suggests that these agencies are empowered to determine who is eligible for the antitrust exemption. The agencies lack antitrust expertise, and there was no reason for the court of appeals to give their interpretation of statutes and regulations unrelated to the antitrust laws any antitrust significance.[14] See *Otter Tail*

---

[12]The Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. 2301 *et seq.*, and its legislative history support our argument that integrators are not "farmers." See Hearings on S. 109 (Agricultural Producers Marketing Act) before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. 12, 90-91, 95-96 (1967); S. Rep. No. 90-474, 90th Cong., 1st Sess. 2-3, 5-6 (1967).

[13]Section 2 of the Capper-Volstead Act, authorizing the Secretary of Agriculture to prevent cooperative associations from unduly enhancing prices, was not intended to displace, postpone or prevent prosecutions under Section 1 of the Sherman Act. *United States* v. *Borden Co.*, 308 U.S. 188, 206. The Secretary has never issued a complaint in the exercise of his Section 2 responsibilities.

[14]Although the Department of Agriculture has urged the formation of agricultural cooperatives, the practices and publications cited by petitioner (Pet. 17-18; Pet. App. A-38 to A-46) do not suggest that integrators are "farmers" or that cooperatives have antitrust immunity.

Power Co. v. *United States*, 410 U.S. 366, 372-374; *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, 353.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN H. SHENEFIELD,
Acting Assistant Attorney General.

JOHN J. POWERS, III,
BRUCE E. FEIN,
Attorneys.

SEPTEMBER 1977.

DOJ-1977-09

Supreme Court, U. S.
FILED
OCT 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30303

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

1.

To the submission in our Petition for Certiorari that this Court should review the decision below because it excludes a major branch of agriculture from the benefits of the Capper-Volstead Act, casts a cloud of uncertainty over the entire movement toward integrated agricultural production, and may well—

petitioner being the sole national cooperative of producers of broiler chickens—lead to far-reaching changes in the structure of poultry production inimical to everyone concerned, the Department of Justice replies only (and in a footnote) that the consequences of the decision below are "speculative" (Brief Opp. 6 n.4.)[1] But since the Department does not contest the fact that almost ten percent of broiler growers are already employees of integrated producers and that retention of their status as "farmers" would be extremely valuable to these producers for tax as well as antitrust reasons (Pet. 11-12 and n. 7, 8), we submit that what is speculative and unfounded is the Department's hope that the poultry industry will fail to react to a decision so threatening to its welfare.

The simple fact, which the Department's footnote should not be allowed to obscure, is that there is a growing movement toward the integrated production of poultry and other agricultural products. This trend can only be accelerated by a decision that tells the producers that to retain the benefits of "farmer" status they must integrate into the growout phase and make the growers their employees. A decision of such consequence to a major industry requires prompt review by this Court, even if there exists the theoretical possibility that the same legal questions may arise years hence (long after the broiler industry, at least,

[1] The Department suggests that all NBMA's members need to do is simply avoid violating the antitrust laws. (Br. Opp. 6 n. 4). The Solicitor General's statement of the case (Br. Opp. 2) characterizes the activities challenged in the Complaint as a routine exchange of price information and an attempt to insure a stable market for broilers. Such activities do not constitute a hard-core Sherman Act violation. While the alleged activities could, if proved, perhaps amount to a technical violation of Section 1 of the Sherman Act in a non-immune industry, these efforts are also the type of conduct which is widely believed to be beneficial, and indeed essential, in the characteristically fragmented agricultural market. The right to engage in such conduct is not one that the industry will surrender lightly, and it is conceded that integrated producers can retain that right simply by completing their vertical integration into the growout phase of poultry production.

will have complied, through further integration or other measures, with the decision below) in a case involving ducks or turkeys.[2]

2.

The Department of Justice, whose hostility to statutes that provide immunity from the antitrust laws is well known, rejects a functional, purposive approach to statutory construction of the Capper-Volstead Act, instead expressly endorsing the "romantic view" of the statute's meaning—that it was intended to advance the interests of the "traditional farmer" regardless of economic reality (Brief Opp. 7). The Department adopts this approach on the basis of a general conception of legislation as the sale of favors to special-interest groups.[3]

Even if Capper-Volstead were simply special interest legislation on behalf of dirt farmers, there would be no basis for excluding integrated poultry producers from the Act, in view of the fact that integration helps the grower (the Department's conception of a dirt farmer) by shifting most of the risk of market price fluctuation and other uncertainties characteristic of agricultural production from the grower to the integrator.[4] But, more important, the "romantic view" is simply inconsistent with

[2] No conflict between the circuits is imminent, since to our knowledge there are no antitrust cases pending against cooperatives of integrated agricultural producers other than the present case and the private cases against the petitioner, also pending in the Fifth Circuit (Pet 6-7).

[3] Br. Opp. 6 n. 5, citing Landes and Posner, *The Independent Judiciary in an Interest-Group Respective*, 18 J. Law and Econ. 875, 877 (1975).

[4] Assumption of the major production and marketing risks by integrators allows the grower's involvement in production to remain economically feasible, thus keeping rural families on the land and employed in agriculture in accord with the national policy.

the accepted scope of the Act (Pet. 14-15). Owners of plantations are within the Act. So are absentee owners using tenant farmers. So are corporations. So are fully integrated producers —i.e., producers who employ rather than contract with growers. It is too late a date to argue that only the little man is covered by the Capper-Volstead Act. And while it is true that the legislative history contains numerous expressions of solicitude for the small farmer, it is also replete with expressions of concern for the economic welfare of agriculture generally (Pet. 16).[5]

3.

The Department states that the Court below was entitled wholly to ignore the practical view of the responsible federal farm agencies, which have embraced cooperatives of integrated producers as qualified cooperatives, because those agencies "lack antitrust expertise" (Brief Opp. 10).[6] Their lack of such expertise is irrelevant to any issue in this case. If petitioner is a bona fide[7] cooperative of agricultural producers as a matter of

[5] The Department's statement that Congress rejected a proposed amendment that would have extended the Act to integrated producers that "prepare agricultural products for market" (Brief Opp. 7) is inaccurate. The amendment would have extended the Act to producers of *non*-agricultural products made from agricultural components (e.g., textiles from cotton). Pet. 16-17.

[6] In incorrectly stating our contention to be that the Court below failed to give "controlling weight" to the views of the agencies, the Brief in Opposition implies that it gave them some weight. It gave them no weight.

[7] NBMA meets all requirements of the Capper-Volstead Act, including the requirement that *all* its members are producers. The implication in the Department's brief (Br. Opp. 8 n. 10) that two NBMA members do nothing more than process broilers is not supported by the record facts relied upon. Although the two members referred to do not own breeder flocks, hatcheries or feed mills, they are both deeply involved in the live production process through their ownership of the birds at all times, their investment in feed and other growout supplies, their supervision of the growout and their assumption of the major risks of producing and marketing the birds. (R. 529).

agricultural policy, its immunity from Section 1 of the Sherman Act follows automatically. The threshold issue of immunity is decided without reference to antitrust considerations; they come into play only when it is determined that the defendant in the antitrust suit is not immune. This point is so elementary that in the absence of any other effort to suggest a justification for the court of appeals' refusal to give weight to the view of the responsible agencies, we take it to be conceded that the court below failed to follow the teachings of *Bayside Enterprises, Inc. v. National Labor Relations Board*, 429 U.S. 298 (1977) regarding the weight to be accorded the agencies' views in construing the term "farmer" as it appears in the various agricultural statutes.

Respectfully submitted,

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
1200 Citizens and Southern
National Bank Building
35 Broad Street
Atlanta, Georgia 30303
(404) 588-0300

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637
Counsel for Petitioner

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONER

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
35 Broad Street
Atlanta, Georgia 30303

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 813 Olive Street 63101 314-231-4477

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Introduction	3
Facts	4
The Formation of Petitioner and the Antitrust Litigation	7
Summary of Argument	9
Argument	12
Introduction	12
I. The Language, Context, History, and Administrative Interpretation of the Term "Farmer" in the Capper-Volstead Act Show That the Act Covers the Integrated Broiler Producer Who Temporarily Relinquishes Custody of the Bird During Its Grow-Out Phase	13
II. The Purposes of the Capper-Volstead Act Would Be Ill Served by a Construction That Excluded Integrated Broiler Producers From Its Scope	20
Conclusion	27
Statutory Appendix	A-1

CITATIONS

Cases:

Bayside Enterprises, Inc. v. National Labor Relations Board, 429 U.S. 298 (1977) 10, 18, 19

Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967) 23

Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 384 (1967) 15

Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S.Ct. 2549, 2561 n.26 (1977) 25

Garth, 56 T.C. 610 (1971) 24

In Re: Chicken Antitrust Litigation, Civil No. C74-2454A (N.D.Ga.) 7

Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960) 12, 22, 23

National Labor Relations Board v. Hearst Publishers, 322 U.S. 111, 129-31 (1944) 18

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962) 6

Tigner v. Texas, 310 U.S. 141, 145-47 (1940) 18

United States v. Borden Co., 308 U.S. 188 (1939) 23

United States v. Citizens and Southern National Bank, 422 U.S. 86, 113 (1975) 22

United States v. Shimer, 367 U.S. 374 (1961) 18

Statutes and Regulations:

Capper-Volstead Act, Section 1, 7 U.S.C. § 291 . A-1 and passim

Capper-Volstead Act, Section 2, 7 U.S.C. § 292 ..... passim

Clayton Act, Section 6, 15 U.S.C. § 17 2

Cooperative Marketing Act of 1926, 7 U.S.C. § 451, et seq. 22

Farm Credit Act of 1971, 12 U.S.C. § 2129 18

Sherman Anti-Trust Act, Section 1, 15 U.S.C. § 1 ... 2, 12, 24

Treas. Reg. § 1.471-6(a) 24

Rules:

Rule 23(e), F.R. Civ. P. 7

Legislative Material:

59 Cong. Rec. 7851 (1920) 20

61 Cong. Rec. 1041 (1921) 19, 20, 21

61 Cong. Rec. 1042 (1921) 21

61 Cong. Rec. 1041-42 (1921) 24

62 Cong. Rec. 2052 (1922) 14, 15, 21

62 Cong. Rec. 2059 (1922) 21

62 Cong. Rec. 2060 (1922) 21

62 Cong. Rec. 2172 (1922) 15

62 Cong. Rec. 2173 (1922) 10, 15

62 Cong. Rec. 2217 (1922) 24

62 Cong. Rec. 2227 (1922) 17

62 Cong. Rec. 2262 (1922) 21

62 Cong. Rec. 2273 (1922) 17

H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921) 15, 19

H.R. Rep. No. 116, 69th Cong., 1st Sess. (1926) 22

Hearings on H.R. 2373 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 1st Sess. 195 (1921) 15

Miscellaneous:

Benson and Witzig, The Chicken Broiler Industry: Structure, Practices and Costs (U.S. Dep't of Agriculture, Agricultural Economic Report No. 381, 1977) 26

Leppert, Produce Broilers at Less Cost in a One-Site Production Complex, Broiler Industry, March 1977 25

Note, Antitrust Liability for an Exchange of Price Information—What Happened to Container Corporation?, 63 Va. L. Rev. 639, 656-60 (1977) 22

Roy, Alternatives for Integrators, Broiler Industry, September 1977 .....13, 25

Torgerson, After NBMA, What Next?—Five Scenarios, Broiler Industry, August 1977 25

U.S. Dep't of Agriculture, Agricultural Statistics (1945) .. 14

U.S. Dep't of Agriculture, Agricultural Statistics (1952) .. 23

U.S. Dep't of Agriculture, Economic Research Service, Poultry and Egg Situation, June 1977 21

U.S. Dep't of the Treasury, Internal Revenue Service, Corporation Income Tax Returns for 1966 23

Ward, Integrated Cattle Marketing—A Better Way, U.S. Dep't of Agr. Farmer Cooperative Serv., FSC Info. 107, May 1977 17

Webster's Third New International Dictionary 13, 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (A. 111)[1] is reported at 550 F.2d 1380. The opinion of the district court granting petitioner's motion for partial summary judgment (A. 81) is not officially reported, but appears at 1975-2 Trade Cas. ¶ 60,509. The order of the district court granting summary judgment and dismissing the complaint (A. 105) is not reported.

[1] "A" references are to the joint appendix filed by the parties in this Court.

JURISDICTION

The judgment of the court of appeals (A. 133) was entered on April 22, 1977. The petition for a writ of certiorari was filed on July 21, 1977, and granted on October 11, 1977. The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Capper-Volstead Act provides that "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" may form cooperative associations which are exempt from Section 1 of the Sherman Act. The question presented is whether integrated producers of broiler chickens are precluded from qualifying as "farmers" within the meaning of the Capper-Volstead Act because, although they own the flocks, make all production and marketing decisions, incur more than 90 percent of the cost of producing the broiler chicken, and assume the primary risk of market price fluctuations, they employ independent contractors to tend the chickens during the "grow-out" phase from chick to mature chicken.

STATUTES INVOLVED

Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides in pertinent part:

> "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

The Capper-Volstead Act, 7 U.S.C. §§ 291-292, is printed in its entirety in the Statutory Appendix to this brief. Section 1 of the Act provides in pertinent part:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . ."

STATEMENT

Introduction

The Department of Justice filed this civil antitrust suit against petitioner, a national cooperative marketing association of producers of broiler chickens, charging the association and its members with having combined in violation of Section 1 of the Sherman Act. The essence of the charge is, in the words of the Solicitor General, that the members "routinely exchange

price information and attempt, in other ways, to ensure a market at stable prices for their members." (Br. in Opp. 2.)

Petitioner moved for summary judgment on the ground that the Capper-Volstead Act exempts the challenged activities from Section 1 of the Sherman Act. The district court granted the motion and ordered the complaint dismissed. The Court of Appeals for the Fifth Circuit reversed, holding that petitioner was excluded from the protection of the Capper-Volstead Act because the integrated producers who comprise it are not "farmers" within the meaning of the Act.

Facts

The facts are stipulated (A. 91). Broilers—conceded to be an "agricultural product" within the meaning of the Capper-Volstead Act (A. 7)—are young chickens, slaughtered at seven to nine weeks of age, processed, and offered for sale ready to cook. Their production involves the following steps: (1) raising, breeding, and placing breeder flocks for the production of eggs to be hatched as broiler chicks; (2) hatching the broiler eggs and placing the broiler chicks; (3) raising the chicks for a period of seven to nine weeks; (4) catching and cooping the grown-out chickens and hauling them to processing facilities; and (5) preparing the broilers for market (A. 7). Originally, each step was in the hands of a different entity, but gradually the growers, hatcherymen, feed dealers, etc. integrated into most or all phases of broiler production (A. 14). Today more than 95 percent of the broilers marketed in the U. S. are marketed by integrated broiler producers (A. 10).

The typical "integrator," as the integrated broiler producer is known, performs each of the five steps in broiler production listed above with the partial exception of step 3, the "grow-out"

stage.[2] In this stage the integrators hire "growers" to provide certain services and facilities in raising the integrator's chicks to maturity, when the integrator resumes custody of his chickens. Even during the grow-out stage, when the grower has physical custody of the chickens, it is the integrator rather than the grower who makes all decisions regarding the diet and type of feed of the growing chickens and supplies all of the feed consumed by the chickens. The integrator, not the grower, transports the chicks and feed to the growers and the grown-out chickens from the grower to the processing plant. The integrator, not the grower, provides all of the equipment and some or all of the labor for catching, cooping, and loading the live birds. The integrator determines the volume of production, and makes all decisions with regard to the age and size at which the birds shall be marketed. The integrator's fieldmen or supervisors visit the grower frequently (usually every week) to monitor the grower's performance (A. 9-10).

More than 90 percent of the total cost of producing a broiler is incurred by the integrator and less than 10 percent by the grower (A. 11-13, 67). The grower's investment is limited mainly to the buildings in which the chickens are housed during

---

[2] Information regarding the operations of 54 integrator members and former members of NBMA is included in the record. In addition to directing the broiler grow-out operation and owning the broilers throughout the production process, most NBMA members (or firms they own or are commonly owned with) own and operate processing plants in which broilers are slaughtered and dressed for market, feed mills, breeder flocks for the production of broiler eggs, and hatcheries in which the eggs are hatched to become day-old chicks from which broilers are raised. Six of the 54 do not own or control breeder flocks or hatcheries, but purchase chicks from outside sources. One owns a hatchery but does not own or control a breeder flock. Six members do not own or control feed mills, but purchase feed from outside sources. Four members do not own or control any broiler processing facilities; their processing is done through a contractual relationship with another company. Two members do not own or control breeder flocks, hatcheries or feed mills. (A. 8).

the grow-out period. Title to the birds remains with the integrator throughout the grow-out phase.[3]

As the owner and marketer of the birds, the integrator bears the primary risk of changes in prices due to market conditions, which the Department of Justice concedes are typical of those prevailing in agriculture generally and in some cases even more difficult for producers to cope with than is true with respect to other agricultural commodities (A. 14-15). Fresh broilers, which constitute 90 percent of the broiler market, are a perishable commodity and must be marketed regardless of demand. And because the sellers are scattered and uninformed with respect to conditions of demand and supply, the broiler market is highly susceptible to overproduction. Moreover, demand is both seasonal and cyclical, and the buying side of the market is highly concentrated (A. 15).

---

[3] Of the 57 grower contracts in use by petitioner's members and former members, 54 vest ownership of the broiler flocks placed with growers entirely in the members. One contract provides that the member and the grower shall have "joint ownership," and another that the member agrees "to sell broiler chicks" and "to sell to Grower the necessary feed, vaccines, medication, and sanitation products necessary to raise said birds to processing age." (A. 8-9). However, the latter contract further provides that "in the event of death of the birds at anytime prior to the time they are picked up from the Grower's premises, Grower assumes any losses due to the expenditure of labor, use of land, facilities, equipment, and the cost of any fuel or litter. [Member] assumes the loss of the cost of the chicks, feed and other materials supplied by [member]." Undisputed affidavits establish that the title provisions in both contracts are included only to accommodate financing (A. 87, 342, 344).

The third contract is the one in use by a member which is itself a cooperative composed of persons engaged in growing broiler chickens (A. 9). Membership of one producers' cooperative in another such cooperative, and federations of cooperatives, are authorized by the provision in the Capper-Volstead Act that "such associations may have marketing agencies in common." 7 U.S.C. § 291; see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

While most contracts with growers provide for full payment only with respect to birds surviving to marketable age, mortality of birds during the grow-out phase of broiler production averaged only 3.26 percent in a survey of Southern broiler flocks (A. 67).

As a result of the foregoing conditions, integrator profits are both unstable and low, while the grower enjoys a stable return in the nature of a wage (A. 12, 18, 19, 71-74). Integrated broiler production has enabled rural families to maintain or supplement their incomes by acting as contract growers for the integrated producers (A. 19).

The Formation of Petitioner and the Antitrust Litigation

In 1969 the Antitrust Division of the Department of Justice issued a business review letter to the effect that the National Egg Company, a co-operative association of egg producers, would not forfeit its exempt status if it admitted to membership an integrated egg producer that contracted out the care of laying hens in the same manner—described above—as broiler integrators contract out the growing-out of broiler chickens.[4] On the basis of the Antitrust Division's position as expressed in this letter, petitioner association was formed in 1970 (A. 6).

The Justice Department changed its view of the law in 1971 and two years later brought this suit. In its wake more than 30 treble damage class actions were brought against petitioner, some of its members and other producers on behalf of virtually all the nation's purchasers of broiler chickens (other than ultimate consumers). These actions are pending at the district court level in the Fifth Circuit.[5]

The district court in the present case granted summary judgment for petitioner, because (A. 90):

---

[4] Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division to Irving Isaacson, Esquire dated November 24, 1969, Re: National Egg Company—Request for Business Review.

[5] In re Chicken Antitrust Litigation, Civil No. C74-2454A (N.D. Ga.). Plaintiffs in those cases have executed settlement agreements with most defendants (not including petitioner) which, subject to certain contingencies and court approval pursuant to Rule 23(e), F.R. Civ. P., provide for payments to plaintiffs' putative classes in excess of $30,000,000.

> "The involvement of the members of the defendant association in the production of the broilers is sufficient to justify their classification as '[p]ersons engaged in the production of agricultural products as farmers . . .' within the meaning of the Capper-Volstead Act and to permit their claim to the antitrust exemption to the extent permitted by that statute."

The Court of Appeals for the Fifth Circuit reversed, being unable to "conceive that the ordinary, popular sense of the word 'farmers' would fit broiler integrator companies. . . . Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership" (A. 123). The court stated (*id.*):

> "NBMA cautions us against a romantic view of agriculture and points out that agriculture has changed greatly from the Jeffersonian conception of the self-sufficient yeoman. We agree that agriculture has changed much. But the ordinary, popular meaning of the word 'farmer' has not. When the common run of people wish to speak of the broader spectrum of modern agriculture, the word generally used is 'agribusiness.' 'Farmer' still means what it meant in 1922 —one who owns or operates a farm . . . . We believe the Capper-Volstead Act, with its listing of beneficiaries—farmers, planters, ranchmen, dairymen, nut or fruit growers—has a feeling, a cadence of meaning, that has no place for NBMA's member companies."

Reviewing the legislative history of the Capper-Volstead Act (which was enacted in 1922), the court emphasized the defeat of a proposed amendment (the Phipps amendment) that would have permitted sugar and other manufacturers to come under the shelter of the Act if they entered into pre-planting contracts with the farmers from whom they bought the agricultural products used in their manufacturing activities and if the contracts gave the farmers a percentage of the manufacturer's price for the

finished product. While the court acknowledged "that there are differences between the contractual arrangement prevalent in the broiler industry and the arrangements that would have been covered by" the rejected amendment (A. 128), it thought the rejection indicated Congress's intention to keep "subject to the antitrust laws those companies that prepare farm products for market" (A. 129).

SUMMARY OF ARGUMENT

Broiler chickens are an agricultural product that is produced by highly integrated broiler producers. Although these producers own the birds from the day they are hatched (and usually own the breeder flocks and hatcheries as well), are responsible for every step in the production process, and incur more than 90 percent of the total cost of broiler production, they generally employ independent contractors known as growers to keep and tend the chickens during the seven to nine week grow-out phase. The integrator not only retains title to the birds during the grow-out phase but also furnishes their feed and other supplies and closely supervises the grower. Nevertheless, the court below held that, solely because they relinquish custody of the birds to the contract grower during the grow-out phase, the integrated producers are not "[p]ersons engaged in the production of agricultural products as farmers" within the meaning of Section 1 of the Capper-Volstead Act, and therefore cannot join an agricultural cooperative as authorized by that Act. In so holding, the court disregarded the language of the Act, the context in which that language appears, the legislative history, the treatment of the issue by the agricultural agencies, and the underlying purposes of the Act.

A "farmer" is someone engaged in farming, which means simply agricultural production. Broiler chickens are conceded to be an agricultural product within the meaning of the Capper-

Volstead Act, and they happen to be produced by integrated producers. Those producers are today's poultry farmers. To deem the grower the only farmer engaged in producing broiler chickens, when his part of the production process repesents only 10 percent of the total cost, would be to ignore the way in which this agricultural product is actually produced.

Moreover, the context of the term "farmer" in the Capper-Volstead Act shows that it is a term of extension rather than limitation: the Congress concerned lest the term be used to exclude the tiny nut-growing industry could not have meant to deny the entire poultry industry the protection of the Act, yet that is the practical effect of the decision below.

The legislative history also strongly supports our reading of the Act. In listing "farmer" among the agricultural producers who were to be protected, Congress desired to extend the Act to "all of those who have anything to do with raising anything from the soil or from the farm." 62 Cong. Rec. 2173 (1922). Our interpretation of "farmer" gains added support from the unequivocal legislative intent to include both plantation owners, who do no farming (in the narrowest sense of the word) themselves but instead employ tenant farmers, and corporate farm enterprises, which are also not "farmers" in the popular sense relied on by the court below. Even more at variance with the court's stereotyped and anachronistic conception of farming is the fact that, were the integrated producers to buy out the growers, they would then concededly be farmers under the Capper-Volstead Act. Yet the completion of their vertical integration would make them even more dramatic examples of "agribusiness," which the court below deemed utterly antithetical to the popular sense of the term "farmer," than they are today.

Under this Court's recent decision in *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977), the views of an agency which confronts on a daily basis the problems and peculiarities of a particular industry are entitled to substantial consideration. The

federal agricultural agencies routinely treat integrated poultry producers as farmers within the meaning of the Capper-Volstead Act, further supporting our construction.

Finally, the construction for which we contend advances the purposes of the Capper-Volstead Act. They are (1) to improve the bargaining strength of agriculture vis-à-vis the purchasers of agricultural products, (2) to reduce the risks to which agriculture is peculiarly subject as a result of uncertainties of nature and dispersion of producers, and (3) to preserve a role for small farmers in agricultural production.

(1) The integrated producers are the real producers and marketers of poultry products in this country. If they are denied the right to form cooperatives, the protections of the Capper-Volstead Act will be denied to a major sector of American agriculture. The producers' income will be less, and this will mean less income for their partners in the production process, the independent contract growers.

(2) The exchange of price information among producers—the very practice challenged by the complaint—has a valuable role to play in reducing the market risks to which poultry production, like other branches of agriculture, is, as the Department of Justice concedes, subject. Antitrust immunity is necessary to further the important stabilizing purposes of the Act; antitrust enforcement would retard it.

(3) Just as franchising creates a role for the small businessman in the distribution system of a modern economy, so integrated production enables his counterpart in farming, the grower, to participate in modern agricultural production. Strip the integrator cooperatives of their antitrust exemption, and the forces working to transform the independent contract grower into an employee of a fully integrated poultry producer will simply be accelerated.

ARGUMENT

Introduction

Section 6 of the Clayton Act expressly exempts the activities of certain agricultural cooperatives from Section 1 of the Sherman Act. Qualification for the exemption is governed by Section 1 of the Capper-Volstead Act (*Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960)), which authorizes formation of exempt cooperatives by "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers."

Farming has changed since 1922, when the Capper-Volstead Act was passed. A poultry farmer circa 1922 was a man who had chicken coops and a fenced yard for his chickens to wander about in. The modern poultry farmer is a vertically integrated enterprise, an "integrator," controlling hatcheries and breeder flocks, feed mills and slaughterhouses. The newly hatched broiler chick is trucked by the integrator's employees to buildings in which the chicks, numbering in the tens of thousands, spend the next seven or eight weeks, virtually immobilized and fed by conveyor belt and never allowed outdoors; then they are collected and trucked by the integrator to his processing plant.

If the integrator owns the buildings in which the chicks are raised to maturity, then, all concede, he is a poultry farmer within the meaning of the Capper-Volstead Act despite the lack of resemblance to a 1922-style poultry farmer. Often, however, the buildings are owned by someone other than the integrator—by a "contract grower" whom the integrator hires to tend the chicks during the grow-out phase of broiler production. Title to the birds remains with the integrator throughout the entire production process from egg to dressed bird even when he uses a contract grower rather than his own employees to tend the birds during the grow-out phase. Moreover, the

integrator supplies the necessary feed and veterinary services, as well as continuous supervision, during that phase. Ninety percent of the total cost of broiler production is incurred by the integrator, and only 10 percent by the contract grower.

The question in this case is whether the integrator who uses a contract grower rather than his own employees to tend his birds during the grow-out phase thereby forfeits his status of farmer and becomes disentitled to join an agricultural cooperative. Since a contract grower is functionally much like an employee, answering this question in the affirmative might simply accelerate an existing trend toward the absorption of the contract grower by the integrator (see pp. 24-25, *infra*). Alternatively, it might induce the integrators to rewrite their contracts with the contract growers to designate the latter as lessor-employees rather than independent contractors.[6] The decision below is thus, at best, an exercise in empty formalism and, at worst, the death warrant of the independent growers.

The court below erred in deeming such results compelled by the Capper-Volstead Act. We shall demonstrate that its reading of the Act is refuted by every aid to statutory interpretation there is.

I. The Language, Context, History, and Administrative Interpretation of the Term "Farmer" in the Capper-Volstead Act Show That the Act Covers the Integrated Broiler Producer Who Temporarily Relinquishes Custody of the Bird During Its Grow-Out Phase.

The court below, on the combined authority of intuition and *Webster's Third New International Dictionary*, defined "farming" as "husbandry of animals." In so doing, it made an arbitrary

---

[6] As suggested in Roy, *Alternatives for Integrators*, Broiler Industry, September 1977, p. 31.

selection among *Webster's* many definitions of the term "farmer," and ignored the most relevant—one engaged in "farming," which *Webster's* defines simply as "the practice of agriculture." So defined, farmer and farming manifestly embrace the production of broiler chickens by integrators. But even the court's narrow definition of farming as animal husbandry includes the integrator, who in most cases[7] hatches the chick and in all cases supplies its feed and medicines, owns it, bears the risk of loss and of market price changes, and through fieldmen and other personnel closely supervises the contract grower who tends the bird during the grow-out phase of production.

In any event, it would be unsound to define "farmer" in the Capper-Volstead Act without considering the context in which the term appears, *i.e.*, as one of the "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers." 7 U.S.C. § 291. The manifest purpose of this string of terms is to prevent a narrow construction of "farmer" from defeating the broad purposes of a statute designed to foster cooperative agriculture. Could a Congress worried that nut growers might inadvertently be denied the benefits of the Act have intended to exclude the entire poultry industry?[8]

The legislative history makes plain that the term farmer is one of extension rather than limitation. One of the sponsors of the bill was asked: "Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?" 62 Cong. Rec. 2052 (1922). The reply was "descriptive." *Id.* The House Report states: "The aim has been to make the pro-

[7] See note 2, *supra*, p. 5.

[8] The nut-growing industry was one fifty-fifth the size of the poultry industry in 1922. Calculated from U.S. Dep't of Agriculture, *Agricultural Statistics* (1946), pp. 271-73; *id.* (1936), p. 281.

visions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provisions of the bill." H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921). An opponent of the bill described it, without contradiction, as embracing "all of those who have anything to do with raising anything from the soil or from the farm" (62 Cong. Rec. 2173 (1922)). It was explicitly stated that the Act embraced gardeners and plantation owners as well as the listed categories of agricultural producers. 62 Cong. Rec. 2052, 2172 (1922); note 9 *infra*.

The resolution of two important issues in the definition of "farmer" further demonstrates that the term cannot be limited to a 1922-style poultry farmer. First, it is undisputed that a corporation engaged in agricultural production is a farmer within the meaning of the Act. *E.g.*, *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967). Yet in popular parlance a "farmer" is a natural person, not a corporation. Second, the legislative history makes crystal clear that the landowner whose land is farmed by tenant farmers is a "farmer" within the meaning of the Act.[9] In the typical sharecropping arrangement, the owner contributes the land, fertilizer, and seeds, the tenant farmer contributes his labor, and the parties split the proceeds from the sale of the crop 50-50. The equal division of the revenue implies an equal contribution to the cost of raising the crop. If the landowner is a "farmer" under the Capper-Volstead Act, though he does no farming personally and incurs only 50 percent of the cost of producing the crop, *a fortiori* the broiler integrator

[9] "Mr. Lynn . . . [I]f there are certain planters in the South with large plantations, probably with a number of tenants on their places, who want to belong to these associations. I think that those owners should come under this . . .

"Senator Walsh of Montana. Exactly . . . . ."

Hearings on H.R. 2373 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 1st Sess. 195 (1921).

—who incurs more than 90 percent of the cost of producing a broiler chicken—is a farmer.

Never before has the term "farmer" in the Capper-Volstead Act been limited to the popular meaning adopted by the court of appeals. It is undisputed that if Quaker Oats owned a rice plantation which it leased to tenant farmers under a sharecropping arrangement, Quaker Oats would be a farmer within the meaning of the Capper-Volstead Act. The "romantic view" (Br. in Opp. 7) of agriculture adopted by the Justice Department and by the court below for purposes of the present case condones that result. By what logic, or even lexical ingenuity, is it possible to accord Quaker Oats the status of farmer but deny it to the producers of broiler chickens?

A related weakness of the court of appeals' popular-meaning approach is the anomaly created when, as is increasingly frequent and may become more so if the decision below is not reversed (see *infra* pp. 24-25), the growers are the integrator's employees rather than independent contractors. It is conceded that such an integrator, which might be a large corporation owning many feed mills and slaughterhouses, would nonetheless, by virtue of its ownership of its growers' premises, be a "farmer" under the Capper-Volstead Act. Yet such an enterprise would appear to exemplify even more than the typical integrator the inroads of "agribusiness," which the court below deemed antithetical to the popular meaning of "farmer," into traditional farming.

The court below also mistakenly inferred legislative intent not to include integrated producers in the Capper-Volstead Act from the defeat of the Phipps amendment. The amendment would have permitted firms that manufactured sugar from beets (or textiles from cotton) to form exempt marketing cooperatives if they had pre-planting contracts with their agricultural suppliers whereby the supplier would receive a percentage of the

manufacturer's price of his finished product. See 62 Cong. Rec. 2227, 2273 (1922). The proposed amendment was rejected because Congress did not wish to exempt the producers of any nonagricultural product—such as manufactured sugar and textiles—from the antitrust laws. But broiler chickens are conceded to be an agricultural product. The integrated broiler producer is not a manufacturer of some nonagricultural finished product who buys an agricultural input from a farmer; he is the producer of an agricultural product who delegates a small part of the production to another agricultural producer, the contract grower.[10]

There are no formal administrative decisions interpreting the term "farmer" in the Capper-Volstead Act, simply because the Act does not establish an administrative procedure for determining the eligibility of a cooperative. However, the practical construction of the term by the responsible agencies shows that integrated broiler producers are farmers under the Act. The Department of Agriculture assisted in the formation of petitioner association and has worked closely with it (A. 140). To this day the Department continues to encourage the formation of cooperative associations of producers who contract out various production functions—including the grow-out phase of beef production.[11] The Farm Credit Administration recently recognized the legitimacy of petitioner's status as a cooperative of agricultural producers by approving its eligibility to borrow from the New Orleans Bank for Cooperatives (A. 111), pursuant to

---

[10] The statement in the court of appeals' opinion that "a few [of petitioner's members] operate only processing plants" (A. 114) is incorrect. It is stipulated that *all* members of petitioner initiate and direct the live production of the broilers, own the birds throughout the production process, and supply inputs accounting for more than 90 percent of the cost of production (A. 9-10). And see note 2, supra, p. 5.

[11] Ward, *Integrated Cattle Marketing—A Better Way*, U.S. Dep't of Agr. Farmer Cooperative Serv., FSC Info. 107, May 1977 (Pet. App. E, at A-38).

statutory standards materially identical to those of the Capper-Volstead Act. See 12 U.S.C. § 2129 (Supp. IV 1975).[12]

That courts should defer to the administrative interpretation of a technical term in a statute administered by the agency in question is well established. See, *e.g.*, *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129-131 (1944); cf. *United States v. Shimer*, 367 U.S. 374 (1961). We do not argue that informal agency action of the sort involved in this case is entitled to the same weight as a decision in a formal proceeding. We argue only that it is entitled to some weight. The court below gave it none.

The Justice Department would have this Court deny the agricultural agencies' judgment on the farmer status of broiler integrators any weight solely because those agencies lack antitrust expertise (Br. in Opp. 10). That is beside the point. The question whether a broiler integrator is a farmer is a matter of agricultural rather than of antitrust policy (the two policies cannot, of course, be equated[13]). Nothing in the Capper-Volstead Act or its history suggests that the threshold question of who is a farmer is to be decided by reference to antitrust policy—that if, for example, cotton growing were a highly concentrated industry this would be material to deciding whether cotton growers were farmers within the meaning of the Act.

Nor can the Department derive any support for its reading of the Act from *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977). There this Court held that certain truck drivers employed by integrated poultry producers to convey feed from the integrators' feed mills to the contract growers were not "agricultural laborers" within the meaning of the federal labor laws. One point of distinction from the present case is that the drivers in question were employed by feed mills. Since chicken feed is not an agricultural product, a feed mill, even if owned by producers of agricultural products, is not a farm and its employees are not agricultural laborers. In any event, the Court in *Bayside* did not make an independent judgment as to the agricultural status of the employees in question: in accordance with the authorities cited above, it deferred to the responsible agency's judgment.

---

[12] Even the Department of Justice believed until recently that integrated poultry producers were protected by the Capper-Volstead Act—a belief on which the producers relied in establishing the association attacked in this case. Petitioner's refusal to disband after the Department changed its mind is apparently regarded by the Department (see Br. in Opp. 5 n. 3) as vitiating the reliance which petitioner properly placed on the business review letter issued to National Egg Company.

[13] As this Court stated in *Tigner v. Texas*, 310 U.S. 141, 145-47 (1940):

> "[A]n impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy . . . At the core of all these enactments [including the Capper-Volstead Act, specifically cited by the Court] lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process."

The distinctiveness of agricultural policy and the resultant special expertise of the Department of Agriculture in administering the Capper-Volstead Act were explicitly recognized in the debates preceding its enactment. In the words of one Congressman, "the Secretary of Agriculture has been chosen as the public agency rather than some other agent of the Government because the Secretary of Agriculture is assumed to be familiar with the difficulties and problems which are peculiar to agriculture." 61 Cong. Rec. 1041 (1921). See also H.R. Rep. No. 24, 67th Cong., 1st Sess. 3 (1921).

II. The Purposes of the Capper-Volstead Act Would Be Ill Served by a Construction That Excluded Integrated Broiler Producers From Its Scope.

Construing the Capper-Volstead Act to embrace cooperatives of broiler integrators is necessary to secure the purposes of the Act as they are revealed in the debates and committee reports that preceded its enactment. The purposes were threefold: (1) to increase the income of the agricultural sector; (2) to reduce the risk and instability characteristic of agricultural production; and (3) to help the small farmer. All three purposes would be advanced by upholding the farmer status of broiler integrators and retarded by denying them that status.

1. The Congress that enacted the Capper-Volstead Act believed that allowing agricultural producers to band together in cooperatives would increase the bargaining power and hence relative income of farmers vis-à-vis purchasers of farm products, especially middlemen. "This bill is intended to help agriculture reach that degree of business organization and development which will give to it greater economic strength." 61 Cong. Rec. 1041 (1921). "Congress desires to encourage farmers in forming cooperative business organizations and to use such organizations as a means of promoting agricultural prosperity and adding to the profits of the business of farming." 59 Cong. Rec. 7851 (1920) (debate on a predecessor bill to the Capper-Volstead Act).

The production of poultry is a major branch of agriculture today as it was in 1922. And virtually the entire output of the industry is produced by integrated producers, for while the members of petitioner association are producers of broiler chickens, the same kind of growing contract is used by producers of eggs, turkeys, ducks, and other poultry products. Thus, if the decision below is affirmed, the poultry industry will be excluded from the protection of the Capper-Volstead Act. This would be an enormous constriction in its scope.

To be sure, the court below in dictum suggested that the contract growers may form Capper-Volstead cooperatives. But the logic of the court's "ordinary, popular meaning" approach would seem to exclude the contract grower from the definition of "farmer" since he has no crop to market. More important, the grower is a relatively unimportant factor in the production of poultry, supplying elements which account for less than 10 percent of the total cost of production. The integrated producers *are* the poultry farmers in this country today. The decision below would therefore exclude a $7 billion dollar[14] branch of U.S. agriculture from the protection of the Capper-Volstead Act.

2. The framers of the Capper-Volstead Act wanted to reduce the notorious instability of agricultural prices and profits resulting from climatic uncertainty, perishability, dispersion of producers, inadequate transmission of market signals and the like.[15] The Justice Department has conceded that the market conditions in the broiler industry are those characteristic of agriculture generally and are marked by sharp fluctuations in demand and supply that are due in part to the fact that the poultry sellers are scattered and uninformed with regard to demand and supply conditions (see Statement, *supra*, p. 6).

This concession is highly significant in view of the charge in the antitrust complaint in this case. As described by the Solicitor General, it is that the members of petitioner association exchanged price information among themselves with a view

---

[14] See U.S. Dep't of Agriculture, Economic Research Service, *Poultry and Egg Situation*, June 1977, p. 18.

[15] The Congressmen who debated the bill were united in their concern about "the instability of agricultural prices, the rapid and absurd fluctuations to which they are subjected" (61 Cong. Rec. 1041 (1922)), the need for "stabilizing the market" (62 *id.* 2059 (1922)) and the "hazardous" character of agricultural production (62 *id.* 2060 (1922)). See also 61 *id.* 1042 (1921); 62 *id.* 2052, 2262 (1922).

toward stabilizing the market for broiler chickens. Whatever the legality of such information exchanges in the ordinary markets subject to antitrust law—an unsettled question at this time—[16] they are manifestly beneficial under the extraordinary conditions of producer ignorance and dispersion that are characteristic of agricultural markets—including, by stipulation, the market for broiler chickens. The role of information in promoting agricultural price stability is a persistent theme in the history of the formulation of national agricultural policy. In the House Report accompanying the Cooperative Marketing Act of 1926, 7 U.S.C. § 451, et seq., passed just four years after the Capper-Volstead Act, we read: "It is highly important that [cooperative] associations should be allowed to keep their members fully informed in regard to all of the factors affecting the demand for their products. It is generally known that farmers, due to the large number of them and to their widely scattered geographical situation, proceed in many respects unintelligently in regard to the production and marketing of their products." H.R. Rep. No. 116, 69th Cong., 1st Sess. 2 (1926).

Moreover, given the nature of the charge in this case—an exchange of price information designed to stabilize the broiler market—the Justice Department can derive no support from the principle that immunities from the antitrust laws must be narrowly construed. All of the cases cited by the Justice Department applying this principle to the Capper-Volstead Act (Br. in Opp. 9-10) involve attempts by agricultural producers to extend their antitrust immunity to practices that the framers of the Act did not want to immunize from the antitrust laws, such as the predatory practices at issue in *Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960), or the conspiracies with nonagricultural producers involved in *Case-*

[16] See *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975); Note, *Antitrust Liability for an Exchange of Price Information—What Happened to Container Corporation?*, 63 Va. L. Rev. 639, 656-60 (1977).

Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967), and *United States v. Borden Co.*, 308 U.S. 188 (1939). Never before has it been thought proper in the service of "narrowly" construing the Capper-Volstead Act to exclude an entire branch of agriculture from forming producer cooperatives to engage in practices that are clearly immune.[17]

3. The final purpose of the Capper-Volstead Act was to help the small farmer. The Justice Department and the court below exaggerate in suggesting that this is the only purpose of the Act. If it were, the implications would be staggering. Many farmers in the U.S. today are corporations[18] and most U.S. farmers are big businessmen by the standards of 1922.[19] Yet no one has ever suggested that corporate farmers, or farmers whose assets exceed the level appropriate to a sturdy Jeffersonian yeoman, are excluded from the protections of the Capper-Volstead Act.

The legislative history does contain evidence of solicitude for the small farmer, but not to the exclusion of the large. Most of the discussion in the floor debates dealt with the plight of

[17] Section 455 of the Cooperative Marketing Act of 1926, 7 U.S.C. §455, expressly authorizes Capper-Volstead cooperatives to engage in exchanges of price information among members.

A holding that cooperatives which include broiler integrators are immune from Section 1 of the Sherman Act will not create a serious danger that abuses of the competitive process might go uncorrected. The Capper-Volstead Act contains administrative remedies against unduly high prices and, in addition, exempt cooperatives are subject to the proscriptions of Section 2 of the Sherman Act against abuse of monopoly power. *Maryland and Virginia Milk Producers Ass'n v. United States, supra.*

[18] 18,930 as of 1966. U.S. Dep't of the Treasury, Internal Revenue Service, *Corporation Income Tax Returns for 1966*, p. 6.

[19] Gross annual income per farm was $1671 in 1922, $35,978 in 1975. U.S. Dep't of Agriculture, *Agricultural Statistics* (1952), p. 691; (1976), p. 467.

agriculture generally, rather than that of the small farmer in particular. See, *e.g.*, 61 Cong. Rec. 1041-42 (1921). Plantation owners, as we have seen, were definitely intended to be within the protective coverage of the Act. The purpose of the Act was to make agriculture more businesslike, not more pastoral. Agriculture was described as "the biggest of all business." 62 Cong. Rec. 2217 (1922).

The solicitude shown the small farmer merely strengthens our argument that broiler integrators are farmers under the Act. If only the owner of premises on which chickens are raised during the grow-out phase is a farmer, then the integrators may decide to buy out the contract growers and transform them into employees. This would secure the integrators' exemption from Section 1 of the Sherman Act and thereby enable them to engage in exchanges of price information that are both privately valuable to them and, as we have argued, socially beneficial. It would also protect the tax advantages that accrue to their "farmer" status and have been jeopardized by the decision below.[20] To change the contract grower from an independent businessman into an employee will not further the purposes of the Capper-Volstead Act even as narrowly conceived by the Department of Justice.

The Department argues that it is speculative whether the integrators will in fact complete their forward integration in order to avoid the antitrust liability created by the decision below. Perhaps the Department is unaware that integration into the grow-out phase is already proceeding by leaps and bounds. The percentage of broilers produced by fully integrated enterprises (*i.e.*, producers whose growers are employees rather

---

[20] See, *e.g.*, *Garth*, 56 T.C. 610 (1971) (integrated egg producer held to come within the term "farmer" as used in Treas. Reg. § 1.471-6(a), which provides for special inventory accounting methods available only to farmers).

than independent contractors) tripled between 1955 and 1977.[21] In Mississippi, which ranks fifth among the states in the production of broiler chickens, the share of broilers grown by totally integrated producers has already reached 27 percent.[22] There are those who believe that "broilers of higher quality can be produced at a lower cost [at a fully integrated, one-site broiler production complex] than using the conventional contract-growing method."[23] In these circumstances, it is not surprising that experts on the poultry industry believe that the Fifth Circuit's decision in this case may well accelerate the trend toward integration into the grow-out phase.[24] The opinions of impartial experts carry more conviction than the groundless hope of the Justice Department that the poultry industry will fail to react to a decision that denies it the ability to obtain a stable price for its product.

That antitrust liability, by creating incentives to vertical integration, may disserve the interests of the small businessman was recently emphasized by this Court in the analogous context of franchise distribution. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S.Ct. 2549, 2561, n. 26 (1977). Like franchise distribution, contract growing is an ingenious method of fostering small business by shifting some of the risks of entrepreneurship to larger businessmen better able to bear them. The fast-food franchisee can go into business with a small capital investment because he has the use of the trademark, goodwill, and

---

[21] See Torgerson, *After NBMA, What Next?—Five Scenarios*, Broiler Industry, August 1977, p. 20; U.S. Dep't of Agriculture, Economic Research Service, *Poultry and Egg Situation*, June, 1977 p. 43.

[22] See Roy, *Alternatives for Integrators*, Broiler Industry, September 1977, p. 31.

[23] Leppert, *Produce Broilers at Less Cost in a One-Site Production Complex*, Broiler Industry, March 1977, p. 32.

[24] See Torgerson, *supra* note 21, Roy, *supra* note 22.

know-how of a much larger company (the franchisor). In just the same fashion, the contract grower can enter the broiler chicken industry with minimum risk. The integrator supplies the chicks, feed, other supplies, veterinary services, supervision, coopage and hauling, thereby assuming 90 percent of the total cost of broiler production. And he also assumes the market risk, always great in agriculture—specifically, the risk of an unexpected decline in the market price of broiler chickens from the time when the eggs are hatched and the day-old chicks are placed in the broiler house to the time when they are ready for market.

Modern poultry production, operating within the framework of the Capper-Volstead Act, is a marvel of efficiency.[25] The small farmer has a role as contract grower that is consistent with the achievement of maximum efficiency. The antitrust immunity conferred by the Capper-Volstead Act enables cooperatives to cope effectively with demand and supply uncertainties that exceed what is found in the industries subject to the antitrust laws. The repeal of that immunity by the court below will, if upheld, incite a search for ways of preserving the stability of the industry's prices. One way is for the integrator to buy out the contract grower and transform him into an employee; some believe this may happen. An alternative would be an increase in the concentration of poultry production, for larger firms may be better able, through diversification of activities or centralization of information, to cope with the market uncertainties

[25] In 1950, for example, it took twelve to fourteen weeks on average for a broiler to reach 3.5 pounds (live weight). In 1975 it took only seven to eight weeks on average for a broiler to reach 3.5 pounds. This represents an increase in efficiency of more than 42 percent. In 1940, four pounds of feed was required to produce one pound of broiler. In 1975, only 2.1 pounds of feed was required to produce one pound of broiler. This represents a 92 percent increase in the amount of broiler produced from each pound of feed. Benson and Witzig, *The Chicken Broiler Industry: Structure, Practices and Costs* (U.S. Dep't of Agriculture, Agricultural Economic Report No. 381, 1977) pp. 7-8.

characteristic of agriculture generally and broiler production in particular.

These results cannot serve the purposes Congress had in mind in enacting the Capper-Volstead Act. They are compelled not by the language of the Act, or its legislative history or administrative interpretation, but by a narrow and unrealistic conception of farming which the court below improperly read into the Act.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the case remanded with directions to dismiss the complaint in accordance with the district court's judgment.

Respectfully submitted,

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
1200 Citizens and Southern
National Bank Building
35 Broad Street
Atlanta, Georgia 30303
(404) 588-0300

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637

Counsel for Petitioner

APPENDIX

STATUTORY APPENDIX

Sections 1 and 2 of the Capper-Volstead Act, 7 U.S.C. 291 and 292, provide as follows:

> Sec. 1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: **Provided, however,** That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.
>
> Sec. 2. If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly en-

hanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other cause.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

Supreme Court, U. S.
FILED
JAN 11 1978
MICHAEL RODAK, JR., CLERK

No. 77-117

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL BROILER MARKETING ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
JOHN H. SHENEFIELD,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
JOHN J. POWERS, III,
BRUCE E. FEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	9
Argument	11
The language, legislative history and purposes of the Capper-Volstead Act show that integrated broiler producers are not "farmers"	11
A. The exemption for "farmers" applies only to persons who own or work on agricultural land	11
B. The integrators' financial stake in the broilers does not make them farmers	17
C. The Capper-Volstead Act should be construed narrowly	20
Conclusion	25

CITATIONS

Cases:	
Bayside Enterprises, Inc. v. *National Labor Relations Board*, 429 U.S. 298	7, 23
Cantor v. *Detroit Edison Co.*, 428 U.S. 579	6
Case-Swayne Co. v. *Sunkist Growers, Inc.*, 389 U.S. 384	8, 9, 12, 14, 15, 20
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185	14

253-894—78——1

Cases—Continued

	Page
Farmers Reservoir & Irrigation Co. v. *McComb*, 337 U.S. 755	23
Federal Trade Commission v. *Bunte Bros.*, 312 U.S. 349	22
Imco Poultry, 202 N.L.R.B. 259	22–23
Marshall v. *Abbott Farms, Inc.*, 559 F. 2d 1006	7, 23
Marshall v. *Gulf & Western Industries*, Inc., 552 F. 2d 124	23
Maryland and Virginia Milk Producers Association, Inc. v. *United States*, 362 U.S. 458	7, 12
National Labor Relations Board v. *Strain Poultry Farms, Inc.*, 405 F. 2d 1025	7
Northern Pacific Ry. v. *United States*, 356 U.S. 1	20
Otter Tail Power Co. v. *United States*, 410 U.S. 366	22
Simpson v. *Union Oil Co.*, 377 U.S. 13	6
United States v. *Borden Co.*, 308 U.S. 188	12, 20
United States v. *Imperial Irrigation District*, 559 F. 2d 509	17
United States v. *Sisson*, 399 U.S. 267	17
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	22
United States v. *Topco Associates*, 405 U.S. 596	20
Statutes and regulations:	
Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. 2301 *et seq*	17
Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291 *et seq.*:	
Section 1, 7 U.S.C. 291	2, 11
Sections 1–2, 7 U.S.C. 291–292	5

Statutes and Regulations—Continued

	Page
Capper-Volstead Act—Continued	
Section 2, 7 U.S.C. 292	12, 22
Clayton Act, Section 6, 38 Stat. 731, 15 U.S.C. 17	8
Cooperative Marketing Act of 1926, 44 Stat. 802, 7 U.S.C. 451 *et seq.*:	
7 U.S.C. 451–457	21
7 U.S.C. 453(a)	21
7 U.S.C. 455	8
Farm Credit Act of 1971, Title III, 85 Stat. 602, 12 U.S.C. (Supp. V) 2121 *et seq.*:	
12 U.S.C. (Supp. V) 2121–2134	21
12 U.S.C. (Supp. V) 2129	21
Food and Agricultural Act of 1977, Section 102a, Pub. L. 95–113, 91 Stat. 913	17
Sherman Act, Section 1, 26 Stat. 209, as amended, 15 U.S.C. 1	2, 5
28 C.F.R. 50.6	6
29 C.F.R. 780.126	23
Miscellaneous:	
Broiler Business (October 1976)	24
59 Cong. Rec. (1920):	
pp. 7855–7856	13
p. 8017	13
p. 8022	13
p. 8025	13
p. 8026	13
p. 8033	13
61 Cong. Rec. (1921):	
p. 1034	13
p. 1037	13
p. 1040	13
p. 1044	13

Miscellaneous—Continued
62 Cong. Rec. (1922): Page
p. 2048 13
p. 2050 12, 13
p. 2051 11, 12, 13
p. 2052 14, 15
p. 2058 12
pp. 2058–2059 14
pp. 2059–2060 11
p. 2060 11
p. 2156 11, 14
p. 2218 19
pp. 2274–2275 15
p. 2275 15, 16, 19
p. 2277 15
p. 2277–2278 15
Hearings on S. 109 (Agricultural Producers Marketing Act) before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. (1967) 17
H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921) 10, 11, 13
Kennedy, *Legal Formality*, 2 J. Legal Studies 351 (1973) 10
Landes and Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & Econ. 815 (1975) 10
S. Rep. No. 90-474, 90th Cong., 1st Sess. (1967) 17

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 111–132) is reported at 550 F. 2d 1380. The opinions of the district court (A. 81–90, 105–108) are not officially reported.

JURISDICTION

The judgment of the court of appeals (A. 133) was entered on April 22, 1977. The petition for a writ of certiorari was filed on July 21, 1977, and granted on October 11, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether poultry processors that neither own nor operate farms but that contract with growers to feed and raise chickens are "engaged in the production of agricultural products as farmers" within the meaning of the Capper-Volstead Act, 7 U.S.C. 291.

STATUTES INVOLVED

The pertinent portions of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, and the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291, are reproduced at Pet Br. 2–3.

STATEMENT

1. Petitioner is a marketing cooperative composed primarily of vertically integrated "broiler"[1] processors known as "integrators."[2] Most integrators own breeding flocks of chickens that lay eggs, from which chicks hatch. The integrators contract with independent "growers" to husband the chicks for seven to nine weeks (the "grow-out process") until they are large enough to slaughter.

The growers own the land and buildings in which the grow-out process occurs, and they supply the necessary labor. The integrators generally supply and own the birds, and they provide the necessary feed

[1] Broilers are chickens that are slaughtered at seven to nine weeks of age and processed for sale to supermarkets, restaurants, hotels and other institutions (A. 93).

[2] This statement of facts is based on the parties' statements of facts in the district court; it was stipulated (A. 91) that these facts are not disputed.

and veterinary services.[3] The integrators retrieve the grown birds and prepare them for sale (A. 114–115). Most of petitioner's members use independent growers to raise 80 percent or more of their broilers (A. 23).

The contract between an integrator and a grower usually requires the grower to provide the land, buildings, equipment, water, electricity, and labor needed to raise chicks from the day of birth to marketable size and weight (A. 24). Ordinarily, a grower must also supply litter for lining and fuel for heating the broiler houses (A. 26). The day-to-day management of the flocks is the responsibility of the grower (A. 24–25).[4]

The integrator assumes most of the financial risks of changes in the price broilers will fetch in the market (A. 14); the integrator risks capital by investing in each flock. The grower's investment is illiquid; it consists primarily of land, buildings and equipment (A. 10–11), and the growers' investment in these items exceeds the integrators' (A. 13, 23–24).[5]

[3] Petitioner's members have integrated their broiler production in varying degrees. Some operate processing plants and feed mills but purchase chicks from outside sources. Four members, although owning breeder flocks, hatcheries, and feed mills, have declined to invest in processing plants; their processing is done by another company under contract. Two members neither own nor operate broiler flocks, and they have no investment in breeder flocks, hatcheries or feed mills; their sole fixed investment in broiler production is in processing plants (A. 8).

[4] Some growers also are obligated to help the integrators catch and load grown-out broilers for transport to processing plants (A. 24).

[5] Integrators generally are larger businesses than growers, but in some cases growers' investment in broiler husbandry may ex-

The financial arrangements between the integrators and growers depend on the contracts between them, and their terms differ. Many contracts characterize the growers as independent contractors (A. 24–25); no contract characterizes the grower as an employee of the integrator. Particular contracts require growers, in addition to making the substantial investments and contributions discussed above: (1) to pay taxes on chicks, feed, grit, litter, fuel and sanitation products; (2) to pay for chick losses exceeding five percent; (3) to make up the integrator's lost profits if chicks die because of grower negligence; and (4) to pay for 50 percent of the cost of feed destroyed by fire or natural disaster (A. 28). Moreover, many growers receive no compensation for birds that die because of disease or foul weather during the grow-out phase (A. 25).

Many contracts also require the grower to share with the integrator the risk of market fluctuations. A typical contract specifies a minimum and maximum payment to the grower per bird or per pound. The minimum payment provided in some members' contracts is less than the cost incurred by the average grower in raising a flock (A. 26–27). Under contracts used by 23 integrators, the payment received is tied to the market price of broilers (A. 25). Under contracts used by 50 integrators, a grower's payment is

ceed an integrator's investment in breeder flocks, hatcheries and processing facilities (A. 13). Although the fixed costs incurred by integrators usually exceed the grower's fixed costs because of the disparity in size of operation, a substantially higher percentage of the grower's cost is fixed (A. 13, 65).

inversely related to the amount of feed supplied during the grow-out phase (A. 25). Two contracts tie a grower's compensation to the market price of feed or feed ingredients: the higher the price of feed, the lower the grower's compensation (A. 26). And most contracts permit an integrator to reduce payment levels for any new flock if feed costs rise or broiler prices fall (A. 27).[6]

Growers bear market risks indirectly as well. The number of chicks or flocks placed with growers may be reduced if broiler prices fall or seem likely to fall (A. 14–16, 27). The duration of a grower's contract is generally limited to one growing cycle of seven to nine weeks (A. 8); growers' contracts have been terminated for a variety of reasons (A. 27–28), and some have been unsuccessful in obtaining new contracts with other integrators (*ibid.*).

2. On April 16, 1973, the United States filed this civil antitrust action against petitioner. The complaint alleged that petitioner's members engaged in various activities—including exchanging price information and restricting the supply of broilers—designed to fix, maintain, and stabilize the price of broilers, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner contended, among other things, that its questioned practices were sheltered from the antitrust laws by the Capper-Volstead Act, 7 U.S.C. 291–292.

The Capper-Volstead Act partially exempts from antitrust scrutiny the cooperative activities of "[p]er-

[6] In one case an integrator lowered the payment level by 45 percent (A. 27).

sons engaged in the production of agricultural products as farmers * * *." Petitioner argued that the integrators were farmers.[7]

3. The district court agreed with petitioner's argument that the integrators are "farmers" (A. 81–90). The court thought it dispositive that the integrators bear most of the risks of fluctuation in the market for broilers; it also relied on an appellate opinion that

[7] Petitioner's description of the background of this litigation (Br. 7) is incomplete in some respects. In 1969 the Department issued a business review letter to the National Egg Co., expressing an intent not to institute a criminal prosecution of a cooperative that planned to admit a corporation that contracted with farmers for the care of laying hens and the production of eggs. The letter was issued pursuant to a procedure for case-by-case review of particular proposed actions. The Department expressly reserved the right to change its mind and institute a prosecution if the public interest should so require (28 C.F.R. 50.6).

Petitioner was formed in 1970. It did not seek an indication of the Department's enforcement intentions pursuant to the business review procedure. On November 17, 1971, the Department issued a business review letter to Holly Farms Poultry, Inc., concerning Holly's proposal to join petitioner. The business review letter stated that integrators that contracted with growers for the raising of broilers were not farmers within the meaning of the Capper-Volstead Act, and in a simultaneous press release the Department took the position that agricultural cooperatives might forfeit their limited antitrust exemption if they admitted integrators.

Although the Department of Justice thus made clear its legal position, petitioner continued to operate as before. The Department brought suit 17 months later, seeking only an injunction against petitioner's marketing practices. Whether any defense founded on unfairness would be available in a treble damage action is a question that need not be faced in this case. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592–595; cf. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 24–25.

firms similar to the integrators were farmers for purposes of the National Labor Relations Act.[8]

The United States then filed an amended complaint eliminating any allegations that would have allowed it to argue that the integrators overstepped their limited antitrust exemption as Capper-Volstead "farmers" (A. 92–96).[9] The parties stipulated that the United States could refile a complaint at a later date reviving the allegations that had been deleted (A. 91). Because the amendment to the complaint made the integrators' status as "farmers" the controlling issue in the case, the district court entered summary judgment for petitioner (A. 105–110).[10]

[8] The district court relied on *National Labor Relations Board* v. *Strain Poultry Farms, Inc.*, 405 F. 2d 1025 (C.A. 5). But this Court disapproved *Strain* in holding that truck drivers employed by integrators to transport feed to growers are not "agricultural laborers" for purposes of the labor laws. *Bayside Enterprises, Inc.* v. *National Labor Relations Board*, 429 U.S. 298, 299 n. 4. The court of appeals relied in part on *Bayside* in reversing the district court (A. 130–131). See also *Marshall* v. *Abbott Farms, Inc.*, 559 F. 2d 1006 (C.A. 5) (integrated egg producers are not farmers for purposes of the Fair Labor Standards Act).

[9] The exemption is not total; it does not pertain to predatory practices or to conspiracies with persons outside agricultural cooperatives. See *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 362 U.S. 458, 465–467; *United States* v. *Borden Co.*, 308 U.S. 188, 204–206. The Capper-Volstead Act was designed only to allow a cooperative to act as if it were a unitary corporation. But in light of the amendment to the complaint, which eliminated from the case all allegations pertaining to activities that would not be exempt if the integrators are not "farmers," there is no need for the Court to consider what types of activities are exempt.

[10] The question whether the integrators are "farmers" under the Capper-Volstead Act also controls petitioner's claim to anti-

4. The court of appeals reversed (A. 111–132). The court observed that the Capper-Volstead Act exempts only "farmers," not all persons connected with the production of agricultural commodities (A. 121). It first examined the ordinary meaning of "farmer" and concluded that "an irreducible minimum must be either husbandry of animals or crops or farm ownership" (A. 123). Because the integrators neither husband broiler flocks nor own the farms where this task is performed by growers, the court held that they were not farmers (A. 123).

Legislative history reinforced the court of appeals' view that Congress meant to exempt only "farmers" as that term was commonly understood. The court concluded that the Act was designed to bolster the bargaining position of farmers vis-a-vis middlemen, to forestall migration of farmers to the cities, and to preserve the values of independence and individualism nourished by traditional farm life (A. 124–127). Moreover, Congress defeated an amendment that would have included processors, such as sugar refiners that concluded pre-planting contracts with farmers,

---

trust exemption under Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 17, because that statute provides immunity identical to that available under the Capper-Volstead Act. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 391.

Moreover, although petitioner refers (Br. 23 n. 17) to Section 5 of the Cooperative Marketing Act of 1926, 44 Stat. 803, 7 U.S.C. 455, that section authorizes price information exchanges only if petitioners are "farmers" under the Capper-Volstead Act. The district court did not resolve any question concerning that section (see A. 90), and consequently none is properly before this Court.

among those entitled to antitrust exemption (A. 127).

The court held that the integrators are more like middlemen and processors than they are like traditional farmers (A. 128). It explained that "[r]eading 'farmers' in its ordinary sense as meaning those who own or operate farms focuses the benefits of the Act more closely on the persons central to Congress' concern and it keeps subject to the antitrust laws those companies that prepare farm products for market" (A. 129).

SUMMARY OF ARGUMENT

The growers raise the birds from chick to chicken, from the day after their birth until a brief time before their death. It is as if the growers obtained seedlings from the integrators and returned a mature crop. The growers raise and husband their crop of birds, yet the integrators contend that they, rather than the growers, are "farmers."

The integrators are much more like suppliers and processors than they are like farmers; they are more like the orange packing houses that are outside the protection of the Capper-Volstead Act (see *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 393) than they are like the growers of oranges. The integrators doubtless are engaged in the production of agricultural products—so were the operators of the packing houses—but they are not engaged in that production *as farmers*. As the court of appeals concluded (A. 123): "Asked to examine the broiler busi-

ness and to identify the 'farmers,' Justice Frankfurter's common run of men * * * would point to the contract growers—the persons who own and operate the farms—as the 'farmers.' * * * 'Farmer' still means what it meant in 1922—one who owns or operates a farm."

The legislative history shows that the Capper-Volstead Act is a populist statute designed to advance the cause of "actual farmers" (H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921)), the backbone of the populist movement, against the cause of middlemen and suppliers. Congress rejected an amendment that would have extended to entities similar to integrators the exemption from the antitrust laws. The statute is special interest legislation, hardly intended to give privileges to processors and middlemen that were the objects of suspicion. Faithfulness to the intent of the 67th Congress, and adherence to the rule that exceptions to the antitrust laws must be strictly construed, requires the conclusion that integrators are not farmers.[11]

[11] See generally Landes and Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & Econ. 815, 877, 883, 894 (1975); Kennedy, *Legal Formality*, 2. J. Legal Studies 351 (1973).

ARGUMENT

THE LANGUAGE, LEGISLATIVE HISTORY AND PURPOSES OF THE CAPPER-VOLSTEAD ACT SHOW THAT INTEGRATED BROILER PRODUCERS ARE NOT "FARMERS"

A. THE EXEMPTION FOR "FARMERS" APPLIES ONLY TO PERSONS WHO OWN OR WORK ON AGRICULTURAL LAND

The Capper-Volstead Act exemption from the antitrust laws does not apply to all persons associated with agricultural production. It reaches only persons "engaged in the production of agricultural products *as farmers*, planters, ranchmen, dairymen, [or] nut or fruit growers * * *." 7 U.S.C. 291 (emphasis supplied). Congress intended the language to be restrictive; the House Report explained that the language "aimed to exclude from the benefits of this legislation all but actual farmers" (H.R. Rep. No. 24, *supra*, at 1).

The statute was a response to an agricultural depression. Prices of agricultural commodities fell dramatically after World War I,[12] threatening many farmers with bankruptcy[13] and forcing others to leave the land for the cities.[14] Although farm prices fell, the price of food in the cities rose;[15] Congress concluded that part of this disparity was caused by excess profits of middlemen.[16]

The sponsors of the Capper-Volstead Act believed that these trends, so damaging to farmers and farm

[12] 62 Cong. Rec. 2051 (1922) (remarks of Sen. Kellogg).
[13] 62 Cong. Rec. 2060 (1922) (remarks of Sen. Capper).
[14] 62 Cong. Rec. 2059–2060 (1922) (remarks of Sen. Capper).
[15] 62 Cong. Rec. 2060 (1922) (remarks of Sen. Capper).
[16] *Ibid.*

life, could be arrested if farmers acted collectively as their own middlemen. See *Case-Swayne Co.* v. *Sunkist Growers, Inc., supra,* 389 U.S. at 393–394. They hoped that collective marketing would "increase the producer's profit by shortening the road to market," bypassing "the unessential and speculative middleman," and providing "the producer and the consumer their due." [17] Congress saw in higher profits for farmers a way to make the traditional farming life attractive once more, keeping farmers on the land and nourishing their independence and individual effort in keeping with traditional values.[18]

Congress thought that collaboration among farmers would be a boon for farmers and consumers alike, because in its view the elimination of middlemen would lead to lower prices for consumers. It was anxious, however, "to preserve the principles of the Sherman Act against the oppressive power of wealth and great aggregations of capital or any other organization which may oppress the people." [19] Its concern was reflected, in part, by the provision in Section 2 of the Act, 7 U.S.C. 292, of a procedure to assess the fairness of prices charged by agricultural cooperatives.[20]

---

[17] *Ibid.*

[18] 62 Cong. Rec. 2051 (1922) (remarks of Sen. Kellogg); *id.* at 2058 (remarks of Sen. Capper).

[19] 62 Cong. Rec. 2050 (1922) (remarks of Sen. Kellogg).

[20] The Court has held that the remedy under Section 2 is not exclusive. See *United States* v. *Borden Co.*, 308 U.S. 188, 205–206; *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 362 U.S. 458, 462–463.

In order to exclude from the benefits of the Act persons—such as middlemen and processors—that represented "the oppressive power of wealth and great aggregations of capital," Congress carefully limited the statutory description to persons engaged in agriculture "as farmers," a term that Congress understood to mean holders of land,[21] owners of farms,[22] occupiers of farms,[23] persons cultivating their own land,[24] tillers of the soil,[25] and so on. The descriptive terms point in the same direction: only "actual farmers" [26] may organize into cooperatives free from antitrust scrutiny.[27]

---

[21] 62 Cong. Rec. 2050 (1922) (remarks of Sen. Kellogg).

[22] 62 Cong. Rec. 2051 (1922) (remarks of Sen. Kellogg).

[23] *Ibid.*

[24] *Ibid.*

[25] 59 Cong. Rec. 7855–7856 (1920) (remarks of Rep. Evans).

[26] H.R. Rep. No. 24, *supra*, at 1.

[27] See also, *e.g.*, 59 Cong. Rec. 7855–7856 (1920) (remarks of Rep. Evans: "the liberty sought in this bill for the man who tills the soil"); 59 Cong. Rec. 8017 (1920) (remarks of Rep. Volstead); 59 Cong. Rec. 8022 (1920) (remarks of Rep. Sumners); 59 Cong. Rec. 8025 (1920) (remarks of Rep. Hersman); 59 Cong. Rec. 8026) (remarks of Rep. Towner: "this privilege is not to dealers or handlers or speculators for profit; it is limited to the producers themselves"); 59 Cong. Rec. 8033 (1920) (remarks of Rep. Fields); 61 Cong. Rec. 1034 (1921) (remarks of Rep. Walsh); 61 Cong. Rec. 1037 (1921) (remarks of Rep. Blanton); 61 Cong. Rec. 1040 (1921) (remarks of Rep. Towner: "The farmer is an individual unit. He must manage his own farm. He must have his own home"); 61 Cong. Rec. 1044 (1921) (remarks of Rep. Hersey); 62 Cong. Rec. 2048, 2050 (1922) (remarks of Sen. Kellogg, noting the "individualistic nature of the farmer's occupation" and describing a farmer as "a small holder of land"); 62 Cong. Rec. 2051 (1922) (remarks of Sen. Kellogg, observing that the legislation was designed to encourage the farmer "in his ownership, in

The integrators are not "actual farmers" and do not claim to be so. They do not till the land or husband the flocks. They do not own the land on which the flocks are raised.[28] They contend, rather, that they are entitled to solicitude because they bear market risks and provide a stable income for the growers (Br. 23–26).

This contention proves too much. It overlooks the fact that the Court rejected a similar argument in *Case-Swayne* in concluding that orange processors are not "farmers" (389 U.S. at 391–396) and, indeed, that membership of "nonproducer interests" (*id.* at 396) such as processors in a cooperative strips the entire cooperative of antitrust immunity. Petitioner overlooks the fact that Congress did not include every agricultural interest within the definition of "farmers."[29] And, most importantly, petitioner overlooks the fact that Congress considered and rejected a provision that would have included entities like integrators among those entitled to exemption from the antitrust laws.

Senator Phipps proposed an amendment to exempt from the antitrust laws the activities of manufacturers or producers of agricultural products, provided that they entered into pre-planting contracts with farmers and the farmers' compensation depended on the price of the agricultural commodity.[30] Senator Phipps remarked that processors of milk, sugar beets, chicory, fruits and vegetables—agricultural industries with organizations similar in some ways to that of the broiler industry today—would be eligible for antitrust exemption under his amendment.[31] He contended that the amendment would enable farmers to receive higher prices at the same time as it reduced costs to consumers because of savings in distribution.[32]

The leading supporters of the Capper-Volstead Act opposed the Phipps amendment. Senator Kellogg stated that the amendment would permit processors, mills and manufacturers to obtain exemption from the antitrust laws.[33] Senator Norris argued that the

---

the occupation of his farm, and in the cultivation of his own land"); 62 Cong. Rec. 2052 (1922) (remarks of Sens. Cummins, Kellogg and Townsend); 62 Cong. Rec. 2156 (1922) (remarks of Sen. Walsh, observing that the legislation protects only "an organization of the producers themselves of the product of the farm"); 62 Cong. Rec. 2058–2059 (1922) (remarks of Sen. Capper).

Petitioner relies (Br. 15) on a statement made by an opponent of the Capper-Volstead Act to support a broad interpretation of the term "farmer." Statements by opponents, however, are entitled to little weight. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n. 24.

[28] Petitioner therefore draws no sustenance from the fact that both sharecroppers and the owners of sharecropped land may be "farmers": the sharecroppers work the farmland and the owners own it. Integrators do neither.

[29] See 62 Cong. Rec. 2052 (1922) (flour mills are engaged in the production of agricultural products but are not entitled to claim the antitrust exemption). The Court quoted and relied on this exchange in *Case-Swayne*, *supra*, 389 U.S. at 391–392.

[30] 62 Cong. Rec. 2273 (1922).

[31] 62 Cong. Rec. 2273–2274 (1922).

[32] *Ibid.*

[33] 62 Cong. Rec. 2274 (1922).

amendment would allow processors to raise prices to consumers as long as they shared part of the increased profit with farmers.[34] The amendment was defeated (62 Cong. Rec. 2275 (1922)).

The debates on the Phipps amendment establish that processors, other persons who enter into pre-planting agreements with farmers for crops, and so on, are not themselves farmers even though they bear much of the risk of market fluctuation. Congress thought that it would take an amendment to the bill to exempt such persons from the antitrust laws. And Congress rejected the amendment that was proposed, in large measure because it would have jeopardized the interests of consumers and extended the benefits of the statute to the very middlemen and processors that Congress saw as one cause of the difficulties of farmers.[35] Processors with pre-planting contracts have much in common with the integrators, and the rejection of the Phipps amendment therefore disposes of many of petitioner's arguments.

Congress, in 1922, did not exempt integrators from the antitrust laws. To the extent Congress addressed the status of entities related to integrators, it decided that they were not entitled to the benefits of the statute. Petitioner contends (Br. 12) that farming

[34] 62 Cong. Rec. 2275 (1922).

[35] Petitioner correctly observes (Br. 16) that our interpretation of the Capper-Volstead Act would allow an integrator engaged in "agribusiness" to be treated as a farmer if it also owned the place where the birds were nurtured. But the fact that "farmers" may engage collectively in ancillary activities such as the marketing of farm products is not a reason to extend the statute still further to "agribusinesses" that do *not* grow their own chickens.

has changed since 1922, but this is not a sufficient reason to reverse a choice consciously made by Congress. The language of the statute "is not an empty vessel into which this Court is free to pour a vintage that * * * better suits present-day tastes." *United States* v. *Sisson,* 399 U.S. 267, 297. Petitioner's argument that the integrators deserve to be treated like farmers should be addressed to the sitting Congress; the 67th Congress, which passed the Capper-Volstead Act, did not accommodate integrators, and the prerogative of altering laws to suit changed circumstances belongs to Congress rather than the courts.[36]

B. THE INTEGRATORS' FINANCIAL STAKE IN THE BROILERS DOES NOT MAKE THEM FARMERS

Petitioner's central argument is that the integrators are farmers because they bear most of the risks, and incur most of the costs, of the production of broilers.

[36] Modern technology and changes in economic conditions may have overtaken other farming statutes that were passed long ago. See *United States* v. *Imperial Irrigation District*, 559 F. 2d 509 (C.A. 9) (acreage limitation on land irrigated by public projects may be obsolete, but it must be enforced).

Congress has been attentive to the problems of agriculture, but the most recent statutes simply reinforce our arguments concerning the Capper-Volstead Act. For example, Section 102a of the Food and Agricultural Act of 1977, Pub. L. 95–113, 91 Stat. 913, "reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country." The Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. 2301 *et seq.*, is to the same effect. See S. Rep. No. 90–474, 90th Cong., 1st Sess. 2–3, 5–6 (1967); Hearings on S. 109 (Agricultural Producers Marketing Act) before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. 12, 90–96 (1967).

But this Court rejected in *Case-Swayne* the contention that investment and assumption of agricultural risk are enough to make a person a "farmer" under the Capper-Volstead Act.

The growers nurture the birds from the day after birth until shortly before their slaughter. They have day-to-day control over the care of the birds. The contribution of the grower is what turns a bird from a chick into a marketable broiler, just as other farmers tend their fields while the forces of nature turn seeds or seedlings into a mature crop. The growers, not the integrators, invest in farm land and farm buildings. Most of a grower's investment in broiler production is fixed in farm land and farm buildings; an integrator's investment, on the other hand, may be no more than the cost of processing facilities and the cost of a particular flock of birds (A. 9–10, 13, 65).[37] Two members of petitioner own no breeder flocks, hatcheries or feed mills (A. 8, 23); their investment in facilities is limited to processing plants, which, as *Case-Swayne* holds, are not farms.[38]

[37] The growers' fixed investments are those common to farming. They cannot easily be turned to other endeavors if poultry raising should become unprofitable. To cut his losses, a grower may be required to sell or abandon his farm, the result that the Capper-Volstead Act was designed to prevent. Integrators, by contrast, can turn their feedmills to other endeavors (such as selling feed to other livestock raisers).

[38] Petitioner's statement (Br. 17 n. 10) that all of its members are engaged in more than the processing of birds therefore is incorrect. The two members discussed in the text, like the sugar beet processors that the rejected Phipps amendment would have covered, and like the orange packing plant owners discussed in *Case-Swayne*, have no more than an interest in processing, together with investments in particular lots of agricultural products.

Many growers bear market risks directly, because the price they receive from the integrators depends on the price of feed, or processed birds, or both (A. 25–26). The growers also bear market risks indirectly, because the consequence of a decrease in the price of processed birds (or an increase in the price of feed) is a reduction in the number of birds integrators will place for growing (A. 15–16, 27–28), and when integrators place fewer birds, growers are paid less. Integrators may decline to renew a grower's contract after any flock of birds (A. 27), leaving the grower with an investment in farm land and buildings that cannot easily be turned to other uses.[39]

When the price of birds goes down the integrators doubtless suffer, but they do not suffer as farmers. Processors, retailers, and many other persons associated with agriculture bear market risks, but the fact that they do so does not make them farmers.[40]

Petitioner stresses (Br. 15–16) that an integrator's investment in each flock of birds is greater than a

[39] An abandoned farm represents not only a loss to the farmer but also a loss to passersby. "An abandoned farm is an eyesore. It is evidence of local decay, threatening the national fiber, and if permitted to continue imperiling the national health. Let us keep our boys on the farm." 62 Cong. Rec. 2218 (1922) (remarks of Sen. Calder).

[40] In opposing the Phipps amendment despite the fact that sugar refiners had been losing money, Senator Norris observed: "A great many people, a great many retailers, lost money on sugar they had on hand when it went down. I have no joy in seeing anyone lose any money, but I was glad when the price of sugar went down, even though somebody had to lose, and I do not suppose there was any way to put it down without somebody losing." 62 Cong. Rec. 2275 (1922).

grower's, but that disparity is immaterial unless the integrator's investment is made as a farmer; for the reasons discussed above, we submit that it is not.

C. THE CAPPER-VOLSTEAD ACT SHOULD BE CONSTRUED NARROWLY

The Sherman Act "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4. In combination with other antitrust laws, it is "the Magna Carta of free enterprise." *United States* v. *Topco Associates*, 405 U.S. 596, 610. The Capper-Volstead Act is special-interest legislation that derogates from the general statutory policy; it serves an important purpose, but, because it states the exception rather than the rule, it should be strictly construed.[41] *Case-Swayne Co., supra*, 389 U.S. at 393–394; *United States* v. *Borden Co.*, 308 U.S. 188, 198, 204–206.

Petitioner presses on this Court an inventive and sweeping interpretation of "farmer." To the extent its contentions amount to an invitation to rewrite the

[41] Petitioner asserts (Br. 22) that "the Justice Department can derive no support from the principle that immunities from the antitrust laws must be narrowly construed." This is so, petitioner maintains, because the cooperative activities it carries out are beneficial to the chicken industry. But this argument confuses the question of statutory exemption with the question whether the activities described in the complaint are illegal under the antitrust laws. (What is more, petitioner's emphasis on the benefits of price information exchanges in an atomistic market overlooks the fact that the complaint (A. 94–95) alleges price fixing and restrictions on quantity of birds produced, not simply the exchange of information.)

Capper-Volstead Act to take changed circumstances into account, they are addressed to the wrong forum. To the extent its contentions amount to a plea for consistent treatment, they are mistaken.

Petitioner argues (Br. 18) that the Department of Agriculture and the Farm Credit Administration have treated integrators as farmers and that they should receive the same treatment under the Capper-Volstead Act. But the statutes on which petitioner relies were not passed by the 67th Congress and did not address the problems to which the Capper-Volstead Act was directed.[42]

[42] Petitioner relies, for example, on its treatment under the Farm Credit Act of 1971, 85 Stat. 602, 12 U.S.C. (Supp. V) 2121–2134. But that statute separately defines "producers" and "farmers" (12 U.S.C. (Supp. V) 2129), and petitioner classifies itself as a cooperative of "agricultural producers" (Br. 17) rather than as a cooperative of "farmers." This statute, and petitioner's eligibility for credit under it, therefore have no bearing on the definition of "farmer" for purposes of the Capper-Volstead Act.

Petitioner also has received assistance from the Department of Agriculture under the Cooperative Marketing Act of 1926, 44 Stat. 802, 7 U.S.C. 451–457. But this statute allows the Department to render assistance to cooperatives consisting entirely of "associations of producers of agricultural products, and federations and subsidiaries thereof, engaged in the cooperative marketing of agricultural products, including processing, warehousing, manufacturing, storage, the cooperative purchasing of farm supplies, credit, financing, insurance, and other cooperative activities" (7 U.S.C. 453(a)). This definition of eligible cooperatives is far broader than the definition contained in the Capper-Volstead Act. The fact that petitioner has received assistance from the Department of Agriculture therefore does not establish that integrators are "actual farmers." (The Department of Agriculture agrees with this interpretation of the Cooperative Marketing Act and the Farm Credit Act.)

None of the agencies that have classified integrators as agricultural producers for some purposes has expressed the opinion that the integrators are immune from antitrust liability under the Capper-Volstead Act; none has even claimed the competence to do so.[43] The assistance that petitioner received from these agencies therefore has no bearing on the question of antitrust immunity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225–227; *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372–374.

Indeed, the treatment of integrators under other statutes supports the position we take here.[44] For example, the National Labor Relations Board has held that the growers of birds, not the integrators and their employees, are entitled to the agricultural exemption from the National Labor Relations Act. *Imco*

[43] Section 2 of the Capper-Volstead Act allows the Secretary of Agriculture to commence administrative proceedings against cooperatives that charge excessive prices. But discharge of this responsibility to determine the reasonableness of prices ordinarily would not require the Secretary to determine whether a particular person was a "farmer." Moreover, this Court has held that the responsibility given to the Secretary under Section 2 does not affect enforcement of the antitrust laws (see note 20, *supra*), and the Secretary, who has investigated several cases but never filed a Section 2 complaint, has not purported to construe "farmers" in a way favorable to petitioner.

[44] Because "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business" (*Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353), we do not rely heavily on the treatment of integrators under other statutes. But, by the same token, petitioner also draws little support from its treatment under other statutes (see note 42, *supra*).

Poultry, 202 N.L.R.B. 259, 260. This Court accepted that construction of the statute in *Bayside Enterprises, Inc.* v. *National Labor Relations Board*, 429 U.S. 298, which held that the employees who deliver feed to the growers are not agricultural laborers. The Court explained (*id.* at 301) that "[t]he mill in which Bayside produces poultry feed and the processing plant in which it slaughters and dresses poultry are not agricultural operations"; it rejected the integrator's argument that the work of its contract growers converted the labor of its own employees into agricultural labor.[45]

Similarly, employees of integrators are not agricultural employees for purposes of the Fair Labor Standards Act. A regulation of the Secretary of Labor so provides (29 C.F.R. 780.126), and the Secretary's interpretation of the Act has been upheld by the courts. *Marshall* v. *Abbott Farms, Inc.*, 559 F. 2d 1006 (C.A. 5); *Marshall* v. *Gulf & Western Industries, Inc.*, 552 F. 2d 124 (C.A. 5). See generally, *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 761.

Petitioner ultimately falls back on the argument that enforcement of the antitrust laws in the poultry industry would be counterproductive because it would either induce integrators to acquire farms or increase

[45] Petitioner's contention (Br. 19) that Bayside's employees were not agricultural laborers because the feed they delivered is not an agricultural product is incorrect. Chicken feed is made from grain and is an agricultural product; the Court's holding had nothing to do with the proper characterization of chicken feed.

the market share of the larger, more diversified poultry producers (Br. 17, 24–27). But no evidence in the record supports petitioner's contention, and petitioner's prediction is not self-evident.

Many considerations, including the tax laws, the labor relations of the integrators, and the economic efficiency of further integration may be primarily responsible for shaping the structure of the poultry business.[46] Applying the antitrust laws to the broiler business might lead to the formation of additional cooperatives of growers, an outcome that would advance the purposes of the Capper-Volstead Act. One of petitioner's members is a cooperative of growers (A. 9, 29), and petitioner does not suggest that there are impediments to the formation of additional grower cooperatives.

However that may be, petitioner's argument is an empirical contention that should be addressed to Congress. It is not a reason to exempt integrators from antitrust scrutiny under existing laws (see note 41, *supra*.)

[46] Integrators might hesitate to acquire growers because of the capital investment involved (A. 13) or because farm employees' productivity is lower than that of independent farmers (*Broiler Business* 10–11 (October 1976)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JOHN H. SHENEFIELD,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
JOHN J. POWERS, III,
BRUCE E. FEIN,
Attorneys.

JANUARY 1978.

Supreme Court, U. S.
FILED
FEB 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
35 Broad Street
Atlanta, Georgia 30303

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF AUTHORITIES

	Page
Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967)	6
Continental T.V., Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549 (1977)	9
Maryland and Virginia Milk Producers Association v. United States, 362 U.S. 458 (1960)	2
Tigner v. Texas, 310 U.S. 141 (1940)	4
7 USC § 451	5
7 USC § 455	5
59 Cong. Rec. 8022 (1920)	6
H. Rep. No. 89-593, 92d Cong., 1st Sess. 4 (1971)	8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

The Justice Department and amicus briefs base their argument that integrated broiler producers are not within the scope of the Capper-Volstead Act on a misspecification of the charges in this case, an exaggeration of the reach of our argument, a misunderstanding of the principles of statutory construction, and a variety of other errors.

1. The briefs (especially those of the amici) misstate the scope of the complaint. Previously the Justice Department had characterized the charge in this case as follows: "The members of the cooperative routinely exchange price information and at-

tempt, in other ways, to ensure a market at stable prices for their products." (Br. in Opp. 2.) Stabilizing agricultural prices through greater information is an objective most students of agricultural policy would applaud. Coupled with the Department's concession that price and other market conditions in broiler production are the same as those prevailing in agriculture generally (A. 14-15; Pet. Br. 6), the relationship between the challenged conduct of petitioner and the social policies embodied in the Capper-Volstead Act and related agricultural statutes is clear.

Too clear—hence the efforts at obfuscation in the amicus briefs.[1] The brief of the American Farm Bureau Federation[2] argues that if petitioner's claim to immunity is upheld, it will be misused to depress the prices paid growers for their services in the production of broiler chickens. No such conspiracy is alleged in the complaint and nothing in the language, policy, or history of the relevant statutes indicates that it would be shielded from antitrust attack.[3]

---

[1] The Justice Department is not the worst offender in this respect, but it does (at p. 5 of its brief) introduce confusion by stating that the *original* complaint in this case charged a restriction in the supply of broilers as well as an exchange of price information. That complaint, which does not even appear in the printed record, was superseded when the Department later filed a complaint limited to conduct which it conceded to be within the Capper-Volstead exemption. A subsequent footnote in the Department's brief (p. 20 n.41) states that the current complaint continues to allege supply restrictions; in fact, the only section of the complaint even remotely relevant to an allegation of supply restriction, paragraph 9(f) (A. 95), refers to withholding, presumably temporarily and presumably to prevent a glut, already produced broiler parts from market, not to any limitation on the amount produced. An exchange of price information designed to stabilize prices could, of course, increase the supply of broiler chickens; it would have no necessary tendency to reduce it.

[2] The brief, incidentally, fails to state how many—if any—broiler growers are members of the American Farm Bureau Federation.

[3] Predatory practices directed against nonmembers of a cooperative are not within the Act's protective ambit. *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960).

The amicus brief of the treble-damage plaintiffs irresponsibly marshals "evidence" (p. 12) of petitioner's wrongdoing consisting entirely of magazine articles. The charges in the treble-damage cases have been denied by petitioner; their validity has never been adjudicated; the defendants in the treble-damage suits are not defendants in this case, and some are not and never have been members of NBMA. It bears repeating that the Act does not confer an unlimited immunity from antitrust: neither predation nor agreements with nonproducers (Pet. Br. 22-23) are within its scope; and the Secretary of Agriculture has express statutory authority to prevent any undue price enhancement caused by a cooperative's activities (Section 2 of the Capper-Volstead Act, Pet. Br. A-1 to A-2).

2. The Justice Department appears to recognize that a construction of the Capper-Volstead Act which would deny its benefits to a cooperative of integrated broiler producers is illogical. The integrators own the flocks; they initiate, control, and supervise the entire production process; and they incur 90 percent of its costs. If they took just one more step—as many of them have done, and many more will do if the Fifth Circuit's decision in this case is affirmed—and altered their contractual arrangements with the growers so that the latter became employees rather than independent contractors, then the integrators would clearly be protected by the Capper-Volstead Act (see *infra* p. 9), even though they would be bigger and more integrated than they are now.

Because these results make no sense, the Justice Department is led to suggest that sense is not important in interpreting the Capper-Volstead Act. The Act is derided as "special interest legislation" (Br. for U.S. 10, 20)—a "populist statute" (*id.* at 10) to be construed without the aid of reason. The Department relies on an article which states that in interpreting legal rules laid down by legislatures, "The notion of an appeal to the 'spirit' of the original compromise—that is, to its purposes against its

manifestation in the form of rules—makes no sense because the rules, in the conception involved here, *have no spirit*." Kennedy, *Legal Formality*, 2 J. Leg. Studies 351, 383 (1973) (emphasis in original); see also *id.* at 369.

This conception of the Capper-Volstead Act is directly contradicted by this Court's decision in *Tigner v. Texas*, 310 U.S. 141 (1940). There the Capper-Volstead Act was described as one of a series of statutory "manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process." *Id.* at 147. A Populist conception of the statute also cannot be squared with the draftsmen's evident intent to protect large plantation owners and corporate farmers, including, as the Department also concedes, a fully integrated broiler producer (*i.e.*, one who employs rather than contracts with the grower).

Further, if legislation is to be interpreted without reference to its purposes, there is no way to answer difficult questions of statutory interpretation. Hence the string of contradictions and *non sequiturs* that the Department offers as "reasons" for construing the Capper-Volstead Act to exclude the integrated broiler producer. In the same breath the Department suggests that integrators are excluded from the Act because they are "great aggregations of capital" (Br. for U.S. 12) yet affirms that " 'agribusinesses' that . . . grow their own chickens" (*id.* at 16 n.35) are included—thus it is the greater aggregation of capital that a statute directed against "great aggregations of capital" protects. Despite the anticapitalist bias that the Act is said to embody, the grower's own capital investment is emphasized as a reason for classifying growers (and, of course, plantation owners) as farmers (*id.* at 18). And if the grower's capital investment is combined with the integrator's, the resulting "aggregation of capital" is fully protected. Growers are said to bear market risk indirectly because the demand for their services would fall if the demand for broiler chickens fell (*id.* at 19),

but, if so, the integrators' employees are also farmers since they, too, would be adversely affected by a fall in the demand for their employer's product (for example, they might be laid off).

When economics fails, there is metaphysics to fall back upon. The Department's brief states (p. 18): "The contribution of the grower is what turns a bird from a chick into a marketable broiler"—as if without chicks (owned and supplied by the integrator), feed (also supplied by the integrator), veterinary services and supervision and cooping and haulage and processing (ditto), there would be any marketable broilers.

The Department argues that persons "engaged in agricultural production *as farmers*" (emphasis added) are a subclass of producers that excludes the broiler integrator. This reading of the statute renders as surplusage all of its language before the word "farmers". In fact, "farmer" is synonymous with "agricultural producer"; the purpose of the list in which "farmer" appears is not to narrow but to broaden the term "engaged in agricultural production."[4]

Nor is the Department's position supported by its references to legislative history (Br. for U.S. 13 n. 27). The references are of two kinds. The first consists of obviously metaphorical terms for farmer which, if read literally, would exclude the grower as much as the integrator (e.g., "tiller of the soil").

---

[4] The only occasion for narrowing would be if agricultural production were very broadly defined—as in Section 1 of the Cooperative Marketing Act, 7 U.S.C. § 451, which defines agricultural product to include "any and all products raised or produced on farms *and processed or manufactured products thereof*" (emphasis added). This is broader than the concept of agricultural product under the Capper-Volstead Act (see *infra* pp. 6-7). Hence the Cooperative Marketing Act distinguishes between agricultural producers and "original producers of agricultural products," and equates the latter term to "farmers." 7 U.S.C. § 455. Since all agricultural products within the scope of the Capper-Volstead Act are original products, it is plain that in that Act agricultural producer and farmer are interchangeable terms.

The second consists of terms that encompass the integrated producer: "this privilege is not to dealers or handlers or speculators for profit; it is limited to the *producers themselves*" (emphasis added). The Act excludes not the integrated producer but "the gambler in agricultural products, who plays no part in nor contributes to the production of those products." 59 Cong. Rec. 8022 (1920).

There is we submit no substitute for rational and purposive interpretation of the Capper-Volstead Act. The purpose of the Act is to promote agricultural prosperity. It can only be thwarted by an interpretation that places integrated broiler producers beyond the Act's protection unless they complete their integration by taking over the grow-out phase and transforming the growers from independent contractors into employees.

3. The Justice Department tries to discredit our position by exaggerating its reach. We do not contend that only integrators, and not growers, are farmers within the meaning of the Capper-Volstead Act; there is no need to choose between growers and integrators (Br. for U.S. 9) in deciding who is a "farmer" under the Act. Integrator and grower are both farmers just as a plantation owner and his tenant farmer are concededly both farmers under the Act.

The Department also exaggerates the reach of our argument by defining "agricultural product" much too broadly, as any product *made from* an agricultural product (Br. for U.S. 14-15, 23 n. 45)—a definition which would include a straw hat, a pair of leather shoes, and a woolen sweater. In fact, no manufactured products, even if consumed as food—frankfurters, refined sugar, bread, pet food, chicken feed, etc.—are agricultural products under the Capper-Volstead Act. *E.g.*, *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) (packing houses manufacturing canned and concentrated juices, but not participating in the production of oranges

at all, ineligible to join exempt cooperative). Broiler chickens are prepared for market by being plucked and dressed but they are not a product *manufactured* from chicken (as chicken soup is). That is why the Department stipulated that they are an agricultural product. The distinction between a manufactured and an agricultural product explains why Congress rejected the Phipps amendment (which would have extended the protections of the Capper-Volstead Act to certain producers of manufactured products such as refined sugar) and why this Court in *Bayside* held that truck drivers employed by a chicken feed mill were not agricultural laborers (Pet. Br. 16-17, 19).

A related exaggeration of our position is the Department's innuendo that we deem every entity with a financial stake or interest in agricultural production a "farmer" (Br. for U.S. 14, 17), presumably including banks that lend farmers money, manufacturers of agricultural machinery, and buyers of agricultural products such as packing houses. That is not our argument or logically entailed by it. The entities referred to have no operating role or equity interest in the production of an agricultural product. They are creditors (or potential creditors) only. Integrated producers are conceded to be the producers of an agricultural product. The sole issue is whether they forfeit their status as Capper-Volstead producers by contracting out the grow-out phase of broiler production to independent contractors rather than using their own employees as growers. We contend they do not.

4. To our argument that the practical administrative interpretation of the term "farmer" by the responsible farm agencies includes integrated broiler producers the Justice Department replies that the Farm Credit Act applies to "producers" rather than to "farmers." The legislative history makes clear, however, that these are equivalent terms under the Farm Credit Act—and by implication under the Capper-Volstead Act as well—by stating that the eligibility of cooperatives for loans

under the Farm Credit Act "is based on the definition in the Capper-Volstead Act." H. Rep. No. 89-593, 92d Cong., 1st Sess. 4 (1971). The Cooperative Marketing Act is similarly limited to "producers of agricultural products" (Br. for U.S. 21 n.42). It is true that the definition of agricultural *product* is broader under the Farm Credit and Cooperative Marketing Acts than under the Capper-Volstead Act (see note 4 *supra*), but the difference is irrelevant here because it is conceded that petitioner's members are producers of agricultural products within the meaning of the Capper-Volstead Act.

That the Department of Agriculture has assisted petitioner would seem to refute the suggestion in the Justice Department's brief that petitioner is a cooperative of those "processors and middlemen that were the objects of suspicion" by the framers of our agricultural policy (Br. for U.S. 10). One of the facts stipulated to by the Justice Department is that broilers are "distributed through middlemen intervening between the integrator and the consumer." (A. 14) The Department's brief in this Court has confused the middleman with the integrator.

5. The Justice Department contends we have presented no record evidence that affirmance of the decision below will lead to more integration and concentration in the poultry industry (Br. for U.S. 24). This is an argument of desperation, for the relevant facts are, of course, legislative rather than adjudicative in nature, and therefore do not require a trial to establish. (The record does contain data relevant to future prediction: for example, 30 percent of petitioner's members already do at least some growing internally [A. 189-90].) As noted in our opening brief, impartial expert observers believe the Fifth Circuit's decision will accelerate the existing trend toward integration into the grow-out phase that is transforming the grower from an independent contractor into an employee (Pet. Br. 24-25). To this the Department responds with unsupported conjecture—for example, that the tax laws may discourage further

integration (Br. for U.S. 24). But the tax advantages lie with farmer status—and provide an additional reason for believing that the decision below will accelerate the trend toward integrated production (Pet. Br. 24 and n.20). As for the speculations (Br. for U.S. 24 and n.46) that further integration might be discouraged by labor considerations, by the need for additional capital investment by the integrators, and by the allegedly inferior productivity of employees versus independent contractors (even when they are the same people), these factors have not arrested the current trend toward full integration to which the decision below, if affirmed, will lend added momentum. Moreover, there is no need for the integrators actually to purchase the grower's land and buildings; it would seem enough to satisfy the Department's test for an "actual farmer" if the integrators rewrote their contracts with the growers to make the latter employees rather than independent contractors. And the contracts could offer the employees bonuses or other incentives that would induce the same effort from them as the existing contracts do from the contract growers.

6. The Department might conceivably attempt to challenge efforts by integrators to revise their grower contracts so as to preserve their Capper-Volstead status, but this possibility merely illustrates another problem with the Department's "owner or operator of a farm" standard: it will invite endless dispute. The simplicity of such a test is deceptive. To satisfy it, a producer must prove either title to land or buildings in which a crop or flock is grown or an employment relationship with the growers, thus injecting niceties of real property and agency law that have no place in a statute designed to advance agricultural prosperity. Cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S. Ct. 2549 (1977). Much ingenuity will be devoted to changing legal forms in order to avoid the formalistic rule adopted by the Fifth Circuit, and, perhaps, to challenging the changes. Our suggested approach, in contrast, requires merely a judgment

whether a conceded agricultural producer forfeits his status by contracting out a minor (in cost terms) portion of the production process. This is not only a simpler test but one more consistent with the purposes of the Capper-Volstead Act.

CONCLUSION

In its zeal to expand the antitrust laws into every nook and cranny of economic life, the Department of Justice disparages the Capper-Volstead Act as "special interest legislation" that is to be given a narrow and grudging interpretation unrelated to the substantial purposes of the Act in promoting a distinctive agricultural policy. The Department's proposed interpretation would discourage beneficial exchanges of information designed to cope with the notorious instability of agricultural markets, would foster vertical integration in agriculture, and would serve only to vindicate a narrow and dogmatic conception of the appropriate accommodation between antitrust and other federal laws.

The judgment below should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted,

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
35 Broad Street
Atlanta, Georgia 30303

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637

Counsel for Petitioner

MOTION FILED
DEC 22 1977

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

ALLEN A. LAUTERBACH,
General Counsel,
C. DAVID MAYFIELD,
Assistant Legal Counsel,
AMERICAN FARM BUREAU FEDERATION,
225 Touhy Avenue,
Park Ridge, Illinois 60068,
Attorneys for Amicus Curiae.

AMERICAN FARM BUREAU FEDERATION,
Amicus Curiae.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION BY AMERICAN FARM BUREAU FEDERATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The American Farm Bureau Federation, pursuant to Supreme Court Rule 42, hereby respectfully moves for leave to file a brief *amicus curiae* in this case. Written consent of the respondent has been obtained and is filed herewith. Consent of the petitioner was requested but refused.

The American Farm Bureau Federation of 225 Touhy Avenue, Park Ridge, Illinois 60068, is a general farm or-

ganization organized in 1919 under the "General Not For Profit Corporation Act" of the State of Illinois. The American Farm Bureau has as its purpose the promotion, protection and representation of the business, economic, social and educational interests of the farmers and ranchers of the United States. It has member state Farm Bureau organizations in all of the states (except Alaska) and in Puerto Rico, representing more than 2.5 million member families.

The interest of the American Farm Bureau Federation in this case is to represent and protect the economic well-being of all Farm Bureau members engaged in broiler growing and in other forms of farming. Any interpretation of the Capper-Volstead Act by the Supreme Court will have a direct bearing on all farmers and ranchers of the nation.

If the petitioner's position is adopted, farmers and ranchers will lose the rights intended for them under the Capper-Volstead Act. In effect, the petitioner is asking that these grower rights be transferred from the grower to integrated broiler processing companies which neither own nor operate broiler farms. This is contrary to the intent of Congress and is against public policy. Monopoly power—whether it arises in industry, labor, agriculture or government—is a threat to our American way of life and to the individual freedom of every American.

The ability of the broiler growers, as farmers, to collectively bargain with integrated companies would be eliminated if the petitioner's position prevails. The integrated broiler companies, acting in concert as "farmers," could collectively maintain the price or price range to be paid to the broiler grower for the production of broilers without

thereby violating the Sherman Anti-Trust Act. In addition, the integrated companies would have the ability to agree on other production requirements to be uniformly imposed on growers, not mentioning the ability to agree on marketing terms for the sale of processed broilers.

In deliberating the issue of whether an integrated company is a person engaged in the production of agricultural products as a farmer within the meaning of the Capper-Volstead Act, it is doubtful that the parties will fully consider the economic bargaining relationship between the independent contract broiler grower as a farmer entitled to the Act's protection and the integrated company.

The petitioner, in claiming that the integrator is the real farmer of broilers, will scarcely admit to the fact that broilers are actually produced by broiler growers.

Not only does this case involve the rights of broiler growers as farmers, but also a much broader question of the extension of Capper-Volstead benefits to large non-farming businesses which perform production-related activities but neither own nor operate the farms on which the relevant agricultural commodity is produced.

Farmers and ranchers are facing difficult economic conditions today, similar to those confronting farmers in 1922 when the Capper-Volstead Act was enacted. In the wisdom of Congress, the family farmer has needed a legal framework through which he can work together with other farmers in cooperative associations without being held as illegal combinations or conspiracies in restraint of trade.

The Capper-Volstead Act has been a viable law intended to help bona fide farmers achieve a justifiable return for

their investment and labor in producing commodities. The Act was clearly not intended to help those entities which are not farmer owned or controlled and with which farmers must deal to bring the fruits of their labor to market. The contention of petitioner in this case is inimical to the best interests of all American farmers and ranchers.

In view of the issues and ramifications in this case, which are broader in scope than the briefs of the parties hereto would indicate, the American Farm Bureau Federation respectfully requests that it be permitted to file an *amicus curiae* brief in this case so that the views of the farmers and ranchers of the United States in this controversy may be more adequately presented.

Respectfully submitted,

ALLEN A. LAUTERBACH,
General Counsel,
C. DAVID MAYFIELD,
Assistant Legal Counsel,
AMERICAN FARM BUREAU FEDERATION,
225 Touhy Avenue,
Park Ridge, Illinois 60068,
Attorneys for Amicus Curiae.

AMERICAN FARM BUREAU FEDERATION,
Amicus Curiae.

INDEX TO BRIEF

PAGE

Opinions Below 1

Interest of Amicus Curiae..... 2

Argument 3

Integrated Companies Which Do Not Actually Produce Broiler Chickens on Farms But Which Are Otherwise Involved in Production-related Activities and the Sale of Processed Broilers Are Not Persons Engaged as Farmers Under the Limited Antitrust Exemption of the Capper-Volstead Act 3

A. The Function and Input of the Contract Broiler Grower in Actually Producing Broiler Chickens Excludes the Integrated Company as Being a Farmer Which Produces Fowl Within the Meaning of the Capper-Volstead Act 3

B. The Bargaining Position of the Broiler Grower as the Only Farmer of Broilers Is Effectively Eliminated by Conferring Benefits of the Capper-Volstead Act on Integrated Companies 7

C. Subsequent Legislation Prohibits Extension of the Capper-Volstead Act to Integrated Companies 10

Conclusion 14

Citations

Cases

Bayside Enterprises, Inc. v. National Labor Relations Board, 429 U. S. 298 6

Butz v. Lawson Milk Co., Division Consol. Foods Corp., 386 F. Supp. 227 13

Case-Swayne Company v. Sunkist Growers, Inc., 389 U. S. 384 ..... 7, 9

Marketing Assist. Plan, Inc. v. Associated Milk Pro Inc., 338 F. Supp. 1019 13

Maryland and Virginia Milk Producers Association v. United States, 362 U. S. 458 4

Statutes

Agricultural Fair Practices Act, 7 U. S. C. 2301 et seq. 10, 11, 12, 13, 14

7 U. S. C. 2301 10

7 U. S. C. 2302(a) 12

7 U. S. C. 2302(b) 13

7 U. S. C. 2302(c) 13

7 U. S. C. 2303(b) 10

Agricultural Marketing Act of 1929, Section 15(a), 12 U. S. C. 1141j(a) 13, 14

Capper-Volstead Act, 7 U. S. C. 291 et seq. .....*passim*

7 U. S. C. 291 .....2, 4, 13, 14

7 U. S. C. 292 2

Clayton Act, Section 6, 15 U. S. C. 17 ..... 3, 4

National Labor Relations Act, Section 2(3), 29 U. S. C. 152(3) 6

Sherman Act, Section 1, 15 U. S. C. 1 9

Miscellaneous

National Commission on Food Marketing, "Organization and Competition in the Poultry and Egg Industries," Technical Study No. 2, page 10, (1966)..... 8

Senate Report No. 474, 90th Cong., 1st Sess. (1967)..11, 13

U. S. Code, Cong. & Admin. News (1968), page 1875..11, 12

USDA, Farmer Cooperative Service, Service Report 151, pages iv (preface), 4 and 6, (1977)..... 8

62 Cong. Rec. (1922):

page 2057 9

page 2274 9

page 2275 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

OPINIONS BELOW.

The opinion of the court of appeals is reported at 550 F. 2d 1380. The opinion of the district court from which the appeal was made is not officially reported, but appears at 1975-2 Trade Cases, ¶ 60,509, CCH.

INTEREST OF AMICUS CURIAE.

The American Farm Bureau Federation (hereinafter referred to as "Farm Bureau") of 225 Touhy Avenue, Park Ridge, Illinois 60068, is a voluntary general farm organization, representing more than 2.5 million member families in every state (except Alaska) and Puerto Rico. Organized in 1919 under the "General Not For Profit Corporation Act" of the State of Illinois, the Farm Bureau has as its purpose the promotion, protection and representation of the business, economic, social and educational interests of farmers and ranchers of the United States.

At issue in this case is the right of broiler growers as bona fide farmers to collectively avail themselves of the limited antitrust exemption benefits under the Capper-Volstead Act, 7 U. S. C. 291 and 292, for the purpose of improving their bargaining power. Farm Bureau members and others who produce broiler chickens under contract with large integrated companies primarily in the southern and northeastern states constitute "farmers" within the meaning of the Capper-Volstead Act and are fully entitled to the protection of the Act. However, the integrated companies, which belong to petitioner, and with which such broiler producers deal, claim to be the "real" farmers of broilers by virtue of the fact that they contract with the broiler growers for broiler production and maintain an investment in broiler processing and distribution facilities.

If integrated broiler companies are allowed the benefits of the Capper-Volstead Act, the rights of the broiler producer under the Act will be rendered meaningless in view

of the ability of the integrators to collectively impose production terms on the producer.

Farm Bureau, as an organization dedicated to preserving and promoting the rights of bona fide farmers, supports an interpretation of the Capper-Volstead Act which will recognize that the contract broiler producer, and not the integrated company, is the real farmer entitled to the Act's limited antitrust exemption.

ARGUMENT.

Integrated Companies Which Do Not Actually Produce Broiler Chickens on Farms but Which Are Otherwise Involved in Production-Related Activities and the Sale of Processed Broilers Are Not Persons Engaged as Farmers Under the Limited Antitrust Exemption of the Capper-Volstead Act.

A. The Function and Input of the Contract Broiler Grower in Actually Producing Broiler Chickens Excludes the Integrated Company as Being a Farmer Which Produces Fowl Within the Meaning of the Capper-Volstead Act.

The issue before this court requires an explanation of what constitutes a "farmer" under the limited antitrust privileges of Section 6 of the Clayton Act, 15 U. S. C. 17[1]

1. Section 6 of the Clayton Act provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organiza' ons from lawfully carrying out the legitimate

(Footnote continued on next page.)

and Section 1 of the Capper-Volstead Act, 7 U. S. C. 291.[2] Neither statute contains language defining the various attributes of a "farmer." Congress recited merely that farmers are "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers." 7 U. S. C. 291.

(Footnote continued from preceding page.)

objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U. S. C. 17.

2. Section 1 of the Capper-Volstead Act provides:

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such association may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members." 7 U. S. C. 291.

In 1922, Section 6 of the Clayton Act was broadened by enactment of the Capper-Volstead Act. The Capper-Volstead Act extended Section 6 to capital stock agricultural cooperatives. *See Maryland and Virginia Milk Producers Association* v. *United States*, 362 U. S. 458, at 466 (1960).

In spite of the degree of sophistication of modern agriculture or "agri-business," a person or other entity cannot generically be a farmer without owning or operating a farm on which an agricultural commodity is produced. If a farmer engages in other non-farming business or in farm-related business, he still remains a "farmer" for purposes of the agricultural commodity produced on his farm.

The contention of petitioner in the instant case is that persons or entities which neither own nor operate farms on which broiler chickens are produced are nevertheless "farmers" of the broilers under the above Acts. Petitioner claims that its integrated company members are farmers of the 8 to 10 week-old broiler chickens because they engage in one or more farm-related businesses such as broiler processing, feed production, chick production, and hauling. Stated differently, the member companies of petitioner would find it beneficial to call themselves Capper-Volstead type farmers to advance their non-farming investments under the antitrust benefits of the law.

Farmers known as "contract broiler growers" own and operate the farms on which the broilers in question are produced. The broiler grower invests in land, buildings, equipment and labor, and provides the day-to-day skill required to raise a broiler to maturity. The grower contracts with integrated broiler companies for production-related services such as feed supply, cooping and hauling, and chick placement. Under such an arrangement, the integrator has traditionally retained title ownership of the broilers, as would a bank or other lending institution in making a loan. The grower is paid by the integrator for

producing mature broilers on a per pound basis. However, the integrated company maintains no investment or security interest in the broiler grower's farming operation. Therefore, the costs of the actual production facilities are incurred 100% by the broiler grower.

All businesses, farming included, to a large degree, depend upon other businesses. Car manufacturers depend on tire companies; publishing companies depend on paper manufacturers; and housing developers depend on plumbing contractors. However, such dependency does not mitigate the financial risk of any one business. Clearly, one business cannot borrow or absorb the nature or fundamental purpose of another business without a merger or other form of acquisition. In *Bayside Enterprises, Inc.* v. *National Labor Relations Board,* 429 U. S. 298, this court held that the feed truck drivers of an integrated poultry company which did not own or operate farms to which it provided feed for broiler production were not exempt from coverage as agricultural laborers under section 2(3) of the National Labor Relations Act, 29 U. S. C. 152(3). In so holding, Justice Stevens indicated: "For the activity of storing poultry feed and then using it to feed the chicks is work performed by the contract farmer [broiler grower] rather than by Bayside. Since the status of the drivers is determined by the character of the work which they perform for their own employer [integrated company], the work of the contract farmer cannot make the drivers agricultural laborers. And their employer's operation of a feedmill is a nonagricultural activity [footnote omitted]." *Bayside Enterprises, Inc., supra,* 429 U. S. at 303.

On the one occasion that this court specifically discussed the meaning of a "farmer" under the Capper-Volstead

Act, it placed great emphasis on the fact that only "actual producers" of agricultural products are entitled to the benefits of the Act. *Case-Swayne Company* v. *Sunkist Growers, Inc.,* 389 U. S. 384 at 391, 392 and 393. The business interests of citrus packing houses in *Case-Swayne, supra,* not unlike the poultry processing interests of the integrated companies, were held to be "nonproducer," thereby disqualifying the packing houses as bona fide farmer members of the Sunkist cooperative. *Case-Swayne Company, supra,* 389 U. S. at 395 and 396.

B. The Bargaining Position of the Broiler Grower as the Only Farmer of Broilers Is Effectively Eliminated by Conferring Benefits of the Capper-Volstead Act on Integrated Companies.

Allowing integrated companies to assume a farmer status under the Capper-Volstead Act and thereby unify through membership in petitioner will prevent the broiler grower from achieving the economic benefits offered by the Act. Acting under the pretense of being "farmers," integrated companies can combine to eliminate competition among themselves. Elimination of competition through agreement on the marketing prices of processed broilers, the available supply of broilers and other terms would, by necessity, preclude broiler growers from effective negotiations with one or more integrated companies. By virtue of their superior marketing position as "farmers," integrators could impose the price or price ranges to be paid for broiler production. Production quantity and other inputs would also be easily dictated.

The broiler growers' general economic standing would additionally compound their threatened ability to deal with

integrators. As stated by the National Commission on Food Marketing:

> "Contract broiler growing was not, however, an unmixed blessing. Though numerous growers found broiler production more profitable than cotton or other crops, earnings on labor and investment were still low in most instances. There were more farmers hoping to grow broilers than could be accommodated by the contracting companies. Growers have had contracts for only single growout periods, although many have been able to continue for considerable periods with a given company. Numerous farmers constructed houses and facilities without assurance they would obtain chicks and feed to employ their facilities and their labor.'"[3]

In a 1977 Alabama study, broiler growers' average gross return for recent years ranged between 2.1 and 2.4 cents per pound of broilers produced. After deducting cash operating expenses, average net income for a producer was between $5,300 and $5,800 in 1972-4 and at $4,652 for the first eight months of 1975.[4]

An interpretation of the Capper-Volstead Act which would benefit the integrated middlemen to the economic disadvantage of the broiler grower is an anomaly. Congress did not intend to help the middleman with which farmers must deal by enacting the Capper-Volstead Act.

3. National Commission on Food Marketing, "Organization and Competition in the Poultry and Egg Industries," Technical Study No. 2, page 10 (1966).

4. USDA, Farm Cooperative Service, Service Report 151 (1977), pages iv (preface), 4 and 6. Sixty-five percent of the broiler producers surveyed indicated an interest and willingness to invest in a cooperative. This included 73 active broiler growers, 9 of whom were raising pullets. All but two producers owned their farms (page 1).

"To be sure, a principal concern of Congress was to prohibit the participation in the collectivity of the predatory middleman, the speculator who bought crops in the field and returned but a small percentage of their eventual worth to the grower." *Case-Swayne Company, supra,* 389 U. S. at 393.

The defeat by the Senate of an amendment submitted by Congressman Phipps which would have placed manufacturers under the Act also demonstrates congressional intent to exclude from Capper-Volstead protection processing entities which contract with farmers for production output.[5] As stated by Senator Capper in discussing the Act in bill form: "Its purpose is to give to the farmer the same right to *bargain collectively* that is already enjoyed by corporations." [Emphasis supplied.][6]

At page 24 of its brief, the petitioner threatens that if the integrators' exemption from Section 1 of the Sherman Act, 15 U. S. C. 1, is disallowed under the Capper-Volstead Act, then the integrators may decide to buy out the broiler growers and fashion them as employees. Petitioner, in representing its integrated members, would not be before this court if such a "buy out" were a viable alternative. Factors which would preclude such an alternative include the tremendous increase of capital investment in geographically scattered farms and equipment, the added cost of statutory employment benefits, and the superior ability and incentive of broiler producers to independently achieve efficient production.

Although broiler growers, as independent farmers, are confronted by heavyweight integrated companies, the

5. See 62 *Cong. Rec.* 2274 and 2275 (1922).

6. 62 *Cong. Rec.* 2057 (1922).

goliath investment of such companies does not mitigate the farming investment of the broiler grower. The grower's return on farming investment can only be protected by maintenance of a viable bargaining relationship with the integrator. Such a relationship cannot be nurtured if the integrator is allowed the antitrust benefits owed to the broiler producer under the Capper-Volstead Act.

C. Subsequent Legislation Prohibits Extension of the Capper-Volstead Act to Integrated Companies.

Enactment of the Agricultural Fair Practices Act (AFPA) in 1968, 7 U. S. C. 2301 *et seq.*, is indicative that Congress does not consider a poultry integrator which relies on broiler growers for actual production as a "farmer" within the context of current agri-business sophistication.

The purpose of AFPA was to improve the bargaining position of farmers by allowing them to freely join cooperative associations without coercive reprisals from middlemen and other handlers. As stated in the purpose clause: "Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law." 7 U. S. C. 2301.

In protecting the freedom to join cooperative organizations, Congress prohibited discrimination "against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products" because of membership in a cooperative association. 7 U. S. C. 2303(b).[7] The phrase "other handling of agricultural products" is fully explained in the Senate Report to protect the contract broiler grower in the instant case as a producer of agriculture against discrimination by integrated companies: "As introduced, the bill prohibited discrimination in the terms of 'purchase or acquisition' of agricultural products. The committee found that this provision would be ineffective with respect to much that it was manifestly intended to prohibit. *Thus a broiler contractor might furnish hatching eggs or chicks to a producer under a bailment contract where title remained in the contractor;* or a canning company might furnish seeds or tomato plants to a producer under a similar arrangement. *No 'purchase or acquisition' would be involved.* The committee amendment would extend this provision to 'other handling' of agricultural products, thereby covering the examples just given and greatly broadening the scope of this provision." [Emphasis supplied.][8]

Furthermore, in the report of the U. S. Department of Agriculture recommending passage of the Agricultural Fair Practices Act, Secretary Freeman recognized the importance of protecting the bargaining power of contract farmer-producers, such as the broiler grower, against large integrating firms which must rely on contract farmers for production:

> "Cooperative action in agricultural production and marketing is increasing. It is growing in response to

7. 7 U. S. C. 2303(b) prohibits a handler from knowingly engaging in the following practice:

(Footnote continued on next page.)

(Footnote continued from preceding page.)

> "To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition or other handling of agricultural products because of his membership in or contract with an association of producers."

8. Sen. Rep. No. 474, 90th Cong., 1st Sess. (1967).

the need, (1) to achieve more orderliness and efficiency in production and marketing, and (2) to protect and improve bargaining relationships between producers and marketing firms in the face of major changes taking place in the marketing system.

"These changes include the growing integration of production and marketing of agricultural products, the increased control of these functions by large, diversified corporations, and the expanded use of contracting by such corporations to meet their needs. Developments such as these weaken the marketing and bargaining position of individual producers." [Emphasis supplied.][9]

In view of such Congressional and Departmental sentiment, the term "handler" was defined in the AFPA to describe the investment and activities of entities such as the integrated company which could potentially discriminate against the producer. As defined in the Act, the term "handler" means "any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing or *processing agricultural products received from producers* or associations of producers; or (3) *contracting* or negotiating contracts or other arrangements, written or oral, *with or on behalf of producers or associations of producers with respect to the production* or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) . . . [above]." [Emphasis supplied.] 7 U. S. C. 2302(a).[10]

9. U. S. Code, Cong. & Admin. News (1968), page 1875.

10. It is possible that an "association of producers" under the AFPA may also fall within AFPA's definition of a "handler" to

(Footnote continued on next page.)

Congress clearly had the Capper-Volstead Act well in mind in passing the Agricultural Fair Practices Act. The term "association of producers" is defined to mean "any association of producers of agricultural products" as defined in the Capper-Volstead Act, 7 U. S. C. 291, or Section 15(a) of the Agricultural Marketing Act of 1929, 12 U. S. C. 1141j(a). 7 U. S. C. 2302(c). The term "producer" is defined to mean "a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower." 7 U. S. C. 2302(b).[11]

(Footnote continued from preceding page.)

the extent that it acts as a "handler." *Butz* v. *Lawson Milk Co., Division Consol. Foods Corp.*, 386 F. Supp. 227 at 235; *Marketing Assist. Plan, Inc.* v. *Associated Milk Pro., Inc.*, 338 F. Supp. 1019 at 1024. However, it does not follow that all handlers are thereby readily constituted "producers" or entitled to be an "association of producers." The Congressional purpose in not defining "handlers" and "association of producers" as being mutually exclusive was to make certain that the protection of the Agricultural Fair Practices Act would be extended to producer associations which secondarily engaged in handling of its members' products. As stated in the Senate Report:

"The committee gave serious consideration to limiting the protection of the bill *to bargaining cooperatives, which were not engaged in the actual handling of agricultural products* in competition with other handlers. However, this would have excluded cooperatives which might be primarily or partly bargaining associations but also handle some portion of their members' products." Sen. Rep. No. 474, 90th Cong., 1st Sess. (1967). [Emphasis supplied.]

11. 7 U. S. C. 2302(b) provides:

"The term 'producer' means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower."

7 U. S. C. 2302(c) provides:

"The term 'association of producers' means any association of

(Footnote continued on next page.)

In view of the similarity in purpose of the two laws—to improve the bargaining power of farmers—the meaning of the term "farmer" must be consistently construed in both instances. Exclusion of petitioner's members as farmers under the Agricultural Fair Practices Act would thereby require exclusion under the Capper-Volstead Act.

CONCLUSION.

The judgment of the court of appeals declaring that broiler integrators are not "farmers" under the Capper-Volstead Act should be affirmed.

Respectfully submitted,

ALLEN A. LAUTERBACH,
General Counsel,
C. DAVID MAYFIELD,
Assistant Legal Counsel,
AMERICAN FARM BUREAU FEDERATION,
225 Touhy Avenue,
Park Ridge, Illinois 60068,
Attorneys for Amicus Curiae.

AMERICAN FARM BUREAU FEDERATION,
Amicus Curiae.

December, 1977.

(Footnote continued from preceding page.)

producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in section 1141j(a) of Title 12, or in section 291 of this title."

Supreme Court, U. S.
FILED
JAN 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE STATES OF ALABAMA, ET AL. AS AMICI CURIAE

WILLIAM J. BAXLEY
Attorney General
State of Alabama
State Administration Building
Montgomery, Alabama 36104

JOHN D. MACFARLANE
Attorney General
State of Colorado
State Capitol
Denver, Colorado 80203

CARL R. AJELLO
Attorney General
State of Connecticut
Capitol Annex
Hartford, Connecticut 06115

ROBERT L. SHEVIN
Attorney General
State of Florida
State Capitol
Tallahassee, Florida 32304

(Signatures continued inside cover)

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON D. C. 20001

[redacted]

William J. Scott
Attorney General
State of Illinois
[redacted]

Robert F. Stephens
Attorney General
State of Kentucky
[redacted]

Francis X. Bellotti
Attorney General
Commonwealth of Massachusetts
[redacted]

Frank J. Kelley
Attorney General
State of Michigan
[redacted]

William F. Hyland
Attorney General
State of New Jersey
[redacted]

William J. Brown
Attorney General
State of Ohio
[redacted]

Robert P. Kane
Attorney General
State of Pennsylvania
[redacted]

Richard C. Turner
Attorney General
State of Iowa
[redacted]

William J. Guste, Jr.
Attorney General
State of Louisiana
[redacted]

John D. Ashcroft
Attorney General
State of Missouri
[redacted]

Louis J. Lefkowitz
Attorney General
State of New York
[redacted]

Larry Derryberry
Attorney General
State of Oklahoma
[redacted]

James A. Redden
Attorney General
State of Oregon
[redacted]

Julius C. Michaelson
Attorney General
State of Rhode Island
[redacted]

Marshall Coleman
Attorney General
Commonwealth of Virginia
[redacted]

Robert Bevoraat
[redacted]

H. Lawrence Morrison, Jr.
[redacted]

David L. Shapiro
James vanR. Springer
Jos. B. Kadane
[redacted]

Of counsel

INDEX

	Page
INTEREST OF THE AMICI CURIAE	2
I. NBMA'S MEMBERS DO NOT QUALIFY AS "PERSONS ENGAGED IN THE PRODUCTION OF AGRICULTURAL PRODUCTS *AS FARMERS*"	4
II. THE ECONOMIC PURPOSES OF THE CAPPER-VOLSTEAD ACT WOULD NOT BE SERVED BY ALLOWING CHICKEN PROCESSORS WHICH SELL DIRECTLY TO RETAILERS AND LARGE CONSUMERS TO FIX PRICES AND RESTRICT PRODUCTION	9
A. The NBMA Programs For Which Exemption Has Been Claimed Go Far Beyond Information Exchanges And Include Price Fixing And Production Restrictions	9
B. The Contention That The True Chicken Farmers (Contract Growers) Benefit From The NBMA Combination Is Both Unsupported And Irrelevant	12
Conclusion	14

CITATIONS

Cases:	*Page*
Case-Swayne Co. v. *Sunkist Growers, Inc.*, 389 U.S. 384	13
Goldfarb v. *Virginia State Bar*, 421 U.S. 773	13
NLRB v. *Fruit and Vegetable Packers, Local 760*, 377 U.S. 58	6
Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1	13
Northern Securities Co. v. *United States*, 193 U.S. 197	13
White Motor Co. v. *United States*, 372 U.S. 253	10
United States v. *Borden Co.*, 308 U.S. 188	3
United States v. *McKesson and Robbins, Inc.*, 351 U.S. 305	10
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	10, 11
Statutes:	
Agricultural Fair Practices Act, 7 U.S.C. § 2301 *et seq.*	8
Antitrust Improvements Act of 1976, 90 Stat. 1390, 15 U.S.C. §§ 4C-4E	2
Capper-Volstead Act, 7 U.S.C. § 291	*passim*
Clayton Act, 15 U.S.C. §§ 15 and 26	2
Congressional Materials:	
H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921)	6
61 Cong. Rec. (1921)	6
62 Cong. Rec. (1922)	6
Hearings on Substitute Amendment S109 Before A Subcomm. Of The Senate Comm. on Agriculture and Forestry, "Discrimination Against Members of Farmer Cooperatives," 89th Cong., 2d Sess. 182 (1966)	8
Miscellaneous:	
Broiler Industry, November 1971	10
U.S. Dept. of Agriculture, The Chicken Broiler Industry: Structure, Practices and Costs, Economic Research Service Rep. No. 930 (1971)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE STATES OF ALABAMA, ET AL. AS AMICI CURIAE

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the States of Alabama, Colorado, Connecticut, Florida, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island and Virginia.

INTEREST OF THE AMICI CURIAE

In recent years, these States have been aggressive litigants under the federal antitrust laws, suing for damages and injunctive relief on their own behalf, on behalf of subordinate political entities and, where feasible, on behalf of individual consumers. In addition to reinforcing federal antitrust enforcement and increasing enforcement efforts under State antitrust statutes, such "private" actions recoup for State and local governments and for individual citizens some of the losses that such consumers of goods and services suffer by reason of anticompetitive activities.[1]

In execution of their public responsibilities, the undersigned Attorneys General began actions under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, based upon allegations essentially the same as those of the original government complaint below. These actions, which seek damages and injunctive relief on behalf of the States and their cities, counties and other political subdivisions,[2] are brought against both petitioner National Broiler Marketing Association ("NBMA") and thirty-eight companies, of which some are or were NBMA members and the others were non-member participants in NBMA pricing and production-limitation programs. The answers in these actions, like the answer below, assert that NBMA's pro-

[1] *Cf.* Antitrust Improvements Act of 1976 Title III (Parens Patriae), 90 Stat. 1390, 1394-1396, 15 U.S.C. §§ 4C-4E.

[2] Each of the *amici* states filed a separate class action covering its own jurisdiction, and the Connecticut case asserts a nationwide class of other States and their larger political subdivisions. In addition, class actions were filed on behalf of supermarkets, hotels, restaurants, fast food establishments and wholesale distributors. All of the cases have been consolidated under 28 U.S.C. § 1407 in the same district where the present action is pending. *In re Chicken Antitrust Litigation*, M.D.L. No. 237, N.D. Ga. No. C74-2454A.

grams are exempt from antitrust scrutiny by reason of the Capper-Volstead Act, 7 U.S.C. § 291.[3]

The question before this Court is whether the Capper-Volstead Act permits chicken processors to fix the prices and restrict production of ready-to-cook chickens, raised for them by independent "contract growers," under the cloak of the antitrust exemption granted for the formation of "farmer" cooperatives. This question is important not only for the outcome of this case and the related cases in which *amici* are plaintiffs, but also for the more general protection of the interests of both public and private consumers of agricultural products. The States agree with the government and the court of appeals that the partially integrated processors belonging to NBMA ("integrators"

[3] The original government complaint, like the complaints filed by *amici*, included allegations of behavior by NBMA and its members which would have been unlawful even if NBMA had been a legitimate farmer cooperative. In particular, it was alleged that NBMA had been used as the vehicle for an agreement to restrict production of broiler chickens—an activity not permitted to Capper-Volstead cooperatives, which may only "act together * * * in collectively processing, preparing for market, handling, and marketing * * * products of [their members]." 7 U.S.C. § 291. In addition, the original government complaint alleged that NBMA members had conspired with non-member chicken processors; any Capper-Volstead immunity protects only activities within the membership and does not permit concerted action with non-members. *United States* v. *Borden Co.*, 308 U.S. 188, 204-205. Although NBMA's answer, like the answers to the complaints of *amici*, claimed total Capper-Volstead exemption, it was apparent that these allegations presented issues not clearly resolved by a favorable answer to the Capper-Volstead eligibility question.

Following partial summary judgment in NBMA's favor on the eligibility question, the government amended its complaint so as to eliminate these allegations for the nonce in the interest of prompt appellate review of the eligibility question. However, as the court of appeals noted (App. 118), the amendment was without prejudice to the filing of a separate government action realleging the unlawfulness of the production restrictions and the combination with non-members. Because of this proviso and the pendency of these allegations in the "private actions" these issues remain very much alive as a practical matter.

in petitioner's terminology) are not "farmers" within the meaning of the Capper-Volstead Act.

This brief does not attempt to answer comprehensively the arguments presented in petitioner's brief. We comment at the outset upon petitioner's contention that "the term farmer is one of extension rather than limitation" (Pet. Br. 14) and so extensible as to include a corporate "integrator." We then turn to petitioner's assertions about NBMA's activities and their economic effects—assertions that are unsupported by the limited record below, are refuted by NBMA's own public statements and are in any event irrelevant to the issue of statutory construction now before the Court.[4]

I. NBMA'S MEMBERS DO NOT QUALIFY AS "PERSONS ENGAGED IN THE PRODUCTION OF AGRICULTURAL PRODUCTS *AS FARMERS*"

Petitioner accurately summarizes its textual argument as resting upon the proposition that "A 'farmer' is someone engaged in * * * agricultural production" (Pet. Br. 9). The weakness of this proposition is that it contradicts the express language of the Capper-Volstead Act, which makes the cooperative exemption available only to "persons engaged in the production of agricultural products *as farmers* * * *."[5] Thus, it is not enough to be a "person engaged in agricultural production"; in order to qualify, it is necessary to belong also to the more limited subcategory of "farmers." Although the district court incorrectly held that NBMA's members were "farmers", it recognized correctly that the term "farmer" has independent limiting significance:

> "[I]t is conceded that ready-to-cook broilers are agricultural products. The government and the defendant part company, though, over whether the members [of NBMA] are engaged in the production of these products as farmers" (App. 84).

The court of appeals similarly framed the issue (App. 121) and properly disagreed on the scope of the "farmer" subcategory.

In context, the legislative history excerpt cited by petitioner for the proposition that "the term farmer is one of extension rather than limitation" (Pet. Br. 14) shows the exact opposite: After Senator Kellogg responded that the phrase "as farmers, planters, ranchmen, dairymen, nut or fruit growers" was "descriptive of the general subject," the colloquy went on as follows:

> "Mr. CUMMINS: I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?

---

[4] The plaintiffs in the private actions have entered into settlement agreements with most of the defendants other than NBMA. These settlements are, however, subject to certain contingencies, as well as court approval under F.R.Civ.P. 23(e), and are without prejudice to the States' claims for injunctive and other relief against NBMA, the present petitioner.

The settlement agreements provide for creation of settlement classes covering all State and local governmental entities throughout the United States and all other purchasers of chickens which are either members of the classes asserted in the complaints or are identified by the settling defendants. If the settlement is consummated there would be a total payment of approximately $30 million covering all claims for the period since NBMA was formed; the State and local governmental entities would receive approximately $3 million.

[5] 7 U.S.C. § 291; emphasis added. The other subcategories listed in the Act—"planters, ranchmen, dairymen, nut or fruit growers"—obviously have nothing to do with the raising or processing of chickens, and petitioner has not contended otherwise. However, the specificity of these other subcategories suggests that the term "farmer" should be read restrictively.

"Mr. KELLOGG: Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers * * *" 62 Cong. Rec. 2052 (1922).[6]

The House Report on the bill gave as an example of its purpose the plight of grain growers who were "forced to sell their grain to the large terminal elevator companies" because "they can not under existing law combine for the purpose of creating a common marketing agency * * *." H.R. Rep. No. 24, 67th Cong., 1st Sess. p. 2 (1921). Farmers were to be encouraged to displace one level of corporate middlemen standing between themselves and the consumer by organizing their own marketing agencies. The Act was to foster "the processing by the farmers' own association of the product which the farmer himself produces." 62 Cong. Rec. 2053 (1922) (Senator Kellogg); see also, *e.g.*, 61 Cong. Rec. 1033 (Representative Volstead), 2217 (Senator Calder), 2269 (Senator Norris, stating that "In other words, we want to take away the profits of the middlemen.") (1921). In the poultry context, the Act was designed to encourage growers to integrate *forward* by forming cooperatives for collectively processing and marketing the broiler chickens they raise.

The members of NBMA are mostly large chicken-processing companies which sell ready-to-cook chickens to retailers, wholesalers and larger-scale consumers. They include, or have included during the period covered by this litigation, such giant conglomerates and multimillion dol-

---

[6] The House Report on the bill stated that the limitations appearing in the definition of eligibility "are aimed to exclude from the benefits of this legislation all but actual farmers * * *." H.R. Rep. No. 24, 67th Cong., 1st Sess. p. 1 (1921).

Petitioner's reference to a statement by an opponent of the Act (Pet. Br. 15) ignores "the danger, when interpreting a statute, of reliance upon the view of its legislative opponents because, in their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB* v. *Fruit and Vegetable Packers, Local 760*, 377 U.S. 58, 66.

lar corporations as Wilson & Company, Inc., Ralston Purina Company, Marshall Durbin Companies, and Valmac Industries, Inc. Non-member participants in the NBMA programs challenged by the government and by *amici* included such other companies engaged in the processing and sale of ready-to-cook chickens as Allied Mills, Inc., Cargill, Inc., Conagra, Inc., Heublein, Inc., and the Pillsbury Company. NBMA's members alone accounted for approximately 37 percent of all broiler chickens slaughtered in federally inspected plants in 1972 (App. 94), and the non-member participants accounted for a substantial additional fraction.[7]

Although most of these "integrator" companies have breeder flocks and hatcheries (as well as feed mills), they most strongly resemble the middlemen who were the targets, not the intended beneficiaries, of the Capper-Volstead Act. To the extent they are involved in the *production* of chickens, it is through *backward* integration—the exact converse of the forward integration by farmers that Congress sought to encourage. Most important, these companies' involvement in production does not include the actual raising of chickens or the ownership or operation of chicken raising farms; for economic reasons of their own choosing, they have arranged for the chickens they process and sell to be raised by independent "contract growers."

Whatever the status of the "integrator" companies might be if they owned or operated chicken farms, the fact remains that they do not, and the *sine qua non* of being a "farmer" is having a farm. The court of appeals

---

[7] A U.S. Department of Agriculture report has noted the "long-run trend toward greater concentration of broiler processing," with 48 firms handling 70 percent of the total volume as early as 1968. Economic Research Service Report No. 930, *The Chicken Broiler Industry: Structure, Practices and Costs* (1971) at pp. 10-11. The Report further found that some 75 percent of the chickens sold in supermarkets were shipped directly by processors without the intervention of any distributor or wholesaler. *Id.* at p. 30.

properly concluded that "Whatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership" (App. 123) and that "the legislative history of Capper-Volstead has only reinforced our conviction that Congress meant 'farmers' to be read in [this] ordinary sense * * *" (App. 124). The hypothetical corporate plantation owner to which petitioner's brief points as an analogue (pp. 15-16) differs from NBMA's members precisely because it owns and operates the farm on which the agricultural product is raised. Because NBMA's members do neither, but rather subcontract out the raising of the agricultural products they process and sell, they have not become chicken farmers.[8]

---

[8] Congress reiterated the distinction between farmers and integrated processors such as NBMA's members when it enacted the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 *et seq.* That Act prohibits "handlers" from coercing or interfering with the rights of "producers" to form and participate in the activities of Capper-Volstead cooperatives. The definition of "handler" specifically includes companies which have contractual relationships like those between NBMA's members and their contract growers, and there is no question that the statutory term "producers" includes contract growers of chickens. What is particularly pertinent for present purposes is that the definition of a "producer" in the Agricultural Fair Practices Act is taken substantially verbatim from the Capper-Volstead Act's description of those eligible to form cooperatives exempt from the antitrust laws: "a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable or nut grower" (7 U.S.C. § 2302(b)). Thus it is plain that in 1967 at least Congress viewed chicken "integrators" not as persons eligible to form exempt cooperatives but rather as economic antagonists from which such persons needed protection. The legislative history shows a deliberate determination to "[go] back to the Capper-Volstead language" as "more in keeping with the traditional definition of producers * * *." Colloquy among Sen. Aiken and Messrs. Angevine and Neely of U.S. Department of Agriculture, *Hearings on Substitute Amendment S109 Before A Subcomm. Of The Senate Comm. on Agriculture and Forestry*, "Discrimination Against Members of Farmer Cooperatives," 89th Cong., 2d Sess. 182 (1966).

II. THE ECONOMIC PURPOSES OF THE CAPPER-VOLSTEAD ACT WOULD NOT BE SERVED BY ALLOWING CHICKEN PROCESSORS WHICH SELL DIRECTLY TO RETAILERS AND LARGE CONSUMERS TO FIX PRICES AND RESTRICT PRODUCTION

Petitioner begs the question in arguing that the Capper-Volstead Act would suffer an "enormous constriction" unless it is interpreted so as to protect "the poultry industry" (Pet. Br. 20). The intent of Congress in 1922 was decidedly not to protect sellers of processed food products such as the corporations who make up NBMA, and it is not the courts' obligation to stretch the Act beyond its original scope so as to accommodate the desire of these giants of "the poultry industry" for backward integration through contractual arrangements of their own choosing. Any such plea should be addressed to Congress.

Equally spurious, and similarly impertinent to the question of who is a "farmer," are petitioner's contentions (1) that it should be allowed a blanket Capper-Volstead exemption because it has merely engaged in "an exchange of price information designed to stabilize the broiler market" (Pet. Br. 21-23) and (2) that exempting processors will have a salubrious "trickle-down" effect upon the contract growers who are the small farmers intended to benefit from the Capper-Volstead Act (Pet. Br. 23-27).

A. The NBMA Programs For Which Exemption Has Been Claimed Go Far Beyond Information Exchanges And Include Price Fixing And Production Restrictions.

Petitioner's appellate counsel seizes upon the fact that the government's amended complaint was artificially simplified in the interest of prompt appellate review of the "farmer" question (see note 3, *supra*), arguing that exempting NBMA from the antitrust laws would be rela-

tively harmless and even desirable because NBMA's programs merely "exchange price information * * * with a view toward stabilizing the market for broiler chickens" (Pet. Br. 21-22). This argument is inconsistent with the position that NBMA took in the district court and is taking in the related cases in which *amici* are plaintiffs, where it has claimed a Capper-Volstead exemption for all of its alleged activities, including concerted action "to reduce the number of broilers available for marketing" (Government Complaint ¶ 10(i)) as well as straightforward price fixing which continues to be alleged in the amended complaint (¶¶ (b), (c) and (e), App. 95). In any event, a blanket antitrust exemption for NBMA and other similar combinations of agricultural processors can hardly be justified by an unproved assertion that NBMA has so far engaged only in economically desirable concerted action.[9] Compare, *e.g.*, *United States* v. *McKesson and Robbins, Inc.*, 351 U.S. 305, 310, 315-316; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-224. If NBMA is as confident as it claims to be about the propriety of its programs, it has no need for an exemption and should proceed to defend those programs on their merits under the Sherman Act.

NBMA has publicly acknowledged—in reliance upon its purported antitrust exemption—that its *raison d'etre* is to eliminate "dog-eat-dog" competition in favor of a "live-and-let-live philosophy [designed to] help everyone." Interview with Richard E. Larkin (NBMA chief economist), *Broiler Industry*, November 1971, p. 36. To this end, NBMA conducted a telephone conference call program

[9] The record below is limited and does not explore either NBMA's activities or the economics of the broiler chicken market. Petitioner's characterization of that market is constructed entirely from two sentences in the "statement of facts not in dispute" filed by NBMA in support of its partial summary judgment motion (App. 14-15). Surely this is not a sufficient basis for the factual inferences upon which petitioner asks this Court to base a decision in its favor. Compare *White Motor Co.* v. *United States*, 372 U.S. 253.

among its members and cooperating non-members in which supply and price information was collected from the participating companies and analyzed by NBMA's "marketing committee," which then developed "suggested prices" and production recommendations which were communicated back to the companies on a weekly basis. The marketing committee "recommended a market level" at a specific price for each of the major cities in which chickens are sold. Interview with Bob M. Anthony (NBMA general manager), *id.* at p. 44. It also "passed a resolution authorizing standards for pricing undergrades" at specific differentials below the prices for perfect birds. Interview with C. V. Magruder (NBMA staff member), *id.* at p. 28. With respect to the production-restriction program, NBMA's chief economist noted for publication that

> "NBMA member plants, operating in both July 1970 and 1971, reduced their slaughter 6.5% in July from a year earlier. This compared to only 4.4% in non-member plants. The 11 largest NBMA member plants reduced their slaughter an average of 14.2%! The average reduction per plant was over *twice* as large in NBMA member plants as nonmember plants." Interview with Richard E. Larkin, *id.* at p. 35.[10]

NBMA publicly assessed the first year of operation under its pricing and production programs as follows:

> "* * * [W]e have been able to influence the market with regard to timing and pricing of product within the week. Our conference calls have been invaluable in this regard and, of course, are perfectly legal.

[10] Apart from export sales and certain surplus disposal programs which are themselves questionable (*Socony-Vacuum Oil Co.* v. *United States*, 310 U.S. 150), NBMA's members engage in no actual joint marketing. Each member markets, sells and delivers its own chickens, and the "cooperative" activities consist of the kind of consultation and coordination in limiting production and fixing prices that we describe in the text.

> This has been worth perhaps a cent a pound liveweight to industry within our first anniversary year." Interview with Bob M. Anthony, *id.* at p. 38.
>
> "* * * I think we can say, beyond reasonable doubt, that NBMA has been responsible for perhaps one cent of the 1.4 cent increase compared with what history over the last 11 years would have suggested. The improvement was so substantial, and so contrary to the historical projection, that I would place the probability of happenstance as high as 95 to 1." Interview with Richard E. Larkin, *id.* at p. 30.

The *published* evidence is, naturally, only the tip of the iceberg. It suffices, however, to make it clear that NBMA has used its purported antitrust exemption both broadly and imaginatively as a license for activities that—absent the exemption—are *per se* antitrust violations of the most elementary kind.

B. The Contention That The True Chicken Farmers (Contract Growers) Benefit From The NBMA Combination Is Both Unsupported And Irrelevant.

Relying on dire predictions in the trade press (Pet. Br. 25 & n.24), petitioner argues that denial of an antitrust exemption to chicken processing companies will result in still further integration, squeezing the contract growers out of business and thereby frustrating the congressional solicitude for small farmers (Pet. Br. 23-26). There is no support for such a prediction in the barren record below, and it may reasonably be doubted whether an inability to fix prices will cause the processing industry to change a system that otherwise serves its economic interests and, by petitioner's admission, "is consistent with the achievement of maximum efficiency" (Pet. Br. 26).[11] In any event, such

[11] Replacing contract growers through integration would more than double a processor's required investment, for the value of the growers' land and equipment exceeds the value of the breeder flocks, hatchery and processing facilities owned by the otherwise integrated processing companies which they serve (App. 23-24). It is doubtful that many processors could or would hasten to make such major additional investments.

per se violations as price fixing and production restrictions have never been excused or exempted in response to claims that they serve other values or prevent economic doom. *E.g., Goldfarb* v. *Virginia State Bar*, 421 U.S. 773; *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1; *Northern Securities Co.* v. *United States*, 193 U.S. 197, 351. The rule of reason would be peculiarly unsuited to a determination of eligibility under the Capper-Volstead Act.

Petitioner's attempt to justify an NBMA antitrust exemption because of its supposed benefits to contract growers is similar to the argument rejected in *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384. Sunkist argued that membership by non-grower "agency packing houses" in its cooperative should not disqualify it from the Capper-Volstead exemption because the packing houses passed along the benefits of membership to the growers they served. This Court rejected the argument "that Congress, in enacting the measure, intended to give sanction to any organizational form by which the benefits of collective marketing inured to the grower." 389 U.S. at 389-390. It held, rather, that both the language and the legislative history of the Act limited the exemption to cooperatives made up of growers themselves; "we are not justified in expanding the Act's coverage, which otherwise appears quite plain." 389 U.S. at 393. So also here, the statutory limitation of membership to "farmers" cannot be avoided by speculation that the interests of farmers might suffer unless processors as well are exempted from the antitrust laws.

CONCLUSION

For the foregoing reasons and those stated in the government's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General
State of Alabama
State Administration Building
Montgomery, Alabama 36104

CARL R. AJELLO
Attorney General
State of Connecticut
Capitol Annex
Hartford, Connecticut 06115

WILLIAM J. SCOTT
Attorney General
State of Illinois
500 South Second
Springfield, Illinois 62701

ROBERT F. STEPHENS
Attorney General
State of Kentucky
State Capitol
Frankfort, Kentucky 40601

FRANCIS X. BELLOTTI
Attorney General
Commonwealth of Massachusetts
State House
Boston, Massachusetts 02133

FRANK J. KELLEY
Attorney General
State of Michigan
Law Building
Lansing, Michigan 48913

WILLIAM F. HYLAND
Attorney General
State of New Jersey
State House Annex
Trenton, New Jersey 08625

WILLIAM J. BROWN
Attorney General
State of Ohio
State Office Tower
Columbus, Ohio 43215

JOHN D. MACFARLANE
Attorney General
State of Colorado
State Capitol
Denver, Colorado 80203

ROBERT L. SHEVIN
Attorney General
State of Florida
State Capitol
Tallahassee, Florida 32304

RICHARD C. TURNER
Attorney General
State of Iowa
State House
Des Moines, Iowa 50319

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
State Capitol Building
Baton Rouge, Louisiana 70804

JOHN D. ASHCROFT
Attorney General
State of Missouri
Supreme Court Building
Jefferson City, Missouri 65101

LOUIS J. LEFKOWITZ
Attorney General
State of New York
2 World Trade Center
New York, New York 10047

LARRY DERRYBERRY
Attorney General
State of Oklahoma
State Capitol Building
Oklahoma City, Oklahoma 73105

JAMES A. REDDEN
Attorney General
State of Oregon
Executive House
Salem, Oregon 97310

ROBERT P KANE
Attorney General
State of Pennsylvania
Capitol Annex Room 1
Harrisburg, Pennsylvania 17120

JULIUS C. MICHAELSON
Attorney General
State of Rhode Island
Providence County Courthouse
Providence, Rhode Island 02903

MARSHALL COLEMAN
Attorney General
Commonwealth of Virginia
Supreme Court-Library Building
Richmond, Virginia 23219

EMMET BONDURANT
20 Marietta Street, N.W.
Atlanta, Georgia 30303

H. LADDIE MONTAGUE, JR.
1622 Locust Street
Philadelphia, Pennsylvania 19103

DAVID I. SHAPIRO
JAMES VANR. SPRINGER
JOEL B. KLEINMAN
2101 L Street, N.W.
Washington, D.C. 20037

Of counsel